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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No. 2[illegible]**

In the Matter of

FIDELITY TUBE CORPORATION,
Bankrupt.

BOROUGH OF EAST NEWARK and RAYMOND J. OTIS, as Trustee in Bankruptcy of Fidelity Tube Corporation, Bankrupt,
*Appellants,*

vs.

THE UNITED STATES OF AMERICA,
*Appellee.*

## PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Borough of East Newark (hereinafter referred to as "Borough") and Raymond J. Otis, as Trustee in Bankruptcy, etc. (hereinafter referred to as "Trustee") pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on May 3, 1960.

(Italics supplied unless otherwise noted.)

## Opinions Below

The opinion of the Court of Appeals on Rehearing, on which it entered its judgment of the same date with respect to which petitioners (appellants below) seek certiorari, is dated May 3, 1960. The opinion does not yet appear in the official reports, and is printed in the Appendix at A-3 to A-34. The Judgment is printed at A-2a.

A prior opinion of the Court of Appeals, also affirming the judgment of the Court below, is printed in the Appendix at A-35 to A-42.

The opinion of the District Court for the District of New Jersey is reported at 167 F. Supp. 402 and is found in the Appendix at A-43 to A-48.

## Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was made and entered on May 3, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented

1. Is a Trustee in Bankruptcy a "judgment creditor" under Section 3672(a) of the Internal Revenue Code of 1939 in view of Section 70(c) of the Bankruptcy Act (11 U. S. C. A. Sec. 110(c))?

2. Is an unfiled Federal tax lien valid as against a Trustee in Bankruptcy?

3. Does the United States have a tax lien in the absence of assessments and demands made *prior* to bankruptcy under Section 3670 of the Internal Revenue Code of 1939?

## Statutes Involved

The following statutes are here involved, the pertinent portions of which are printed in the Appendix at A-1 to A-2:

Sec. 3670, I. R. C. 1939
Sec. 3671, I. R. C. 1939
Sec. 3672(a), I. R. C. 1939
Sec. 70(c) of the Bankruptcy Act (Act of July 7, 1959, c. 579, 66 Stat. 429, 11 U. S. C. A. sec. 110(c)).

## Statement of Facts

The facts are succinctly set forth in the opinion of the Court of Appeals for the Third Circuit as follows (Appendix A-3):

> "After attempting unsuccessfully to make an arrangement under Chapter XI of the Bankruptcy Act, as amended, 11 U. S. C. A. § 701 et seq., Fidelity Tube Corporation was adjudicated a bankrupt on February 9, 1954. In the ensuing proceedings the United States filed a claim covering taxes in three categories alleged. (Footnote: The claims were based on Federal Unemployment, Withholding and Federal Insurance Contribution Act (Social Security) Taxes.) One category consisted of claims in respect to which assessments and demands had been made prior to the adjudication. The second category consisted of claims in respect to which assessments had been made prior to bankruptcy but as to which demands, if any, were made *after the adjudication.* The third category consists of claims in respect to which assessments and demands were made after adjudication. The United States concedes that it does not have a lien as to the claims described in the third category set out above. As to the claims in the first and second categories, the United States asserts that it is a lien creditor for reasons stated hereinafter. The trustee contends as to the claims in categories one and two as stated above that they were not claims

secured by liens but were entitled to priority only under Section 64a(4) of the Bankruptcy Act, 11 U. S. C. A. § 104(a)(4).

"The Referee held that the trustee was a 'judgment creditor' within the purview of Section 3672 of the Internal Revenue Code of 1939 (Footnote: The Internal Revenue Code of 1939 applies to all aspects of this case. 26 U. S. C. A. § 7851(a)(6)(B)) and that therefore recording of notice was a prerequisite if the claims of the United States were to be accorded liens valid against the trustee. It was conceded by the United States that no notice was filed as required by Section 3672 and the Referee accordingly gave the claims of the United States, as stated above, priority only under Section 64(a)(4) of the Bankruptcy Act. A petition for review was filed by the United States. The court below reversed the Referee. See 167 F. Supp. 402 (1958)."

(Note by Petitioners: The stipulation on file shows that there are insufficient funds in the hands of the Trustee to pay all the aforesaid tax claims in full. Hence, if the decision of the Third Circuit stands, the United States will receive about $65,000.00 out of about $100,000.00 in the Trustee's hands.)

The Borough and the Trustee appealed to the Court of Appeals for the Third Circuit. An opinion was thereafter filed by that Court on September 24, 1959, wherein it agreed (A-39) with the Trustee that the issue as to his status as a judgment creditor under Section 3672 was not foreclosed by *United States* v. *Gilbert Associates*, 345 U. S. 361 (1953), (which held that judgment creditor status created by a fiat of *state law* was not within the meaning of the phrase "judgment creditor" as used in Section 3672). The Court, however, relying on a report of the Committee on Ways and Means of the House of Representatives which accompanied the Internal Revenue Code of 1954 (A-40), concluded that the Trustee was not a judgment creditor within the meaning of the cited statute, and it accordingly affirmed the judgment of the District Court.

The Borough and the Trustee petitioned for a rehearing, pointing out that the House report had no application to the final version of the statute as adopted by Congress. Prior to reargument of the matter, the Court of Appeals withdrew its prior opinion. Thereafter, the Court ordered further reargument *en banc*, and on May 3, 1960, filed its opinion (A-3 to A-34) wherein it concluded, by a divided Court, that the language of the *Gilbert* case was decisive. The judgment of the District Court was again affirmed.

## REASONS FOR GRANTING THE WRIT

### 1. The Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court (Rule 19(b)).

In controversy is a question most vital to the interpretation and administration of the Bankruptcy Act—Is a Trustee in Bankruptcy a "judgment creditor" within the purview of Section 3672(a) of the Internal Revenue Code of 1939?[1]

Section 3670 provides that the United States shall have a lien on all property and rights to property belonging to any person liable to any tax, who refuses to pay such tax on demand; and Section 3672(a) states that with respect to the lien:

> "Such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the collector * * * "

---

[1]Although the provisions of the 1939 Code are here involved, the corresponding sections of the 1954 Code continue the same language.

On the other hand, Section 70c of the Bankruptcy Act (11 U. S. C. A. Sec. 110(c)), provides in part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the right, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

**(a) A holding that Trustee in Bankruptcy is not a "judgment creditor" within Section 3672(a) of the Internal Revenue Code of 1939 will result in subverting the distribution scheme of the Bankruptcy Act.**

The scheme of Section 64 (11 U. S. C. A. Sec. 104) of the Bankruptcy Act expressly contemplates orderly and just payments of taxes to all taxing authorities. This legislation provides a comprehensive plan which enables some classes of unsecured creditors to share in the assets of a bankrupt's estate ahead of, or to the exclusion of, others. It not only promotes equality of treatment among classes of creditors, but it provides an important channel for Congressional control of an equitable distribution of the debtor's assets to his creditors.

> 3 *Collier on Bankruptcy* (14th Ed. 1958), Par. 64.02, page 2054.

The United States and all tax claimants (under Section 64) share *pro rata* in the funds available for distribution. This Court established the foregoing principle in *State of Missouri* v. *Ross*, 299 U. S. 72 (1936) where it stated (pp. 74-75):

> "The intention clearly was to put these various government units in respect of their taxes in a single class upon terms of equality with one another. Since

> Congress was at pains to set forth the order of priority in distinct paragraphs under separate numerals, we are unable to reach any other conclusion. If it had been intended to establish priorities as among the governmental units named in the order in which they appear in the 6th paragraph, the very structure of Section 64b plainly suggests that each would have appeared under a separate numeral instead of all being grouped under a single numeral."

Some five orders of priority are created by Section 64; and, while one class of claims must be paid in full before distribution may be made to the next class in order, those claimants in the same class share *pro rata* in whatever payment is made to that class.

> *State of Missouri* v. *Earhart* (8th Cir. 1940), 111 F. 2d 992, rehg. den. (1940); cert. den. 311 U. S. 676;
> 3 *Collier on Bankruptcy* (14th Edn. 1958), Par. 64.02, page 2056.

The fourth priority of Section 64 comprises "taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof." The importance of this plan of proportionate sharing by taxing authorities can be understood when it is realized that attempts by the Federal government to secure priority by virtue of R. S. 3466 (31 U. S. C. A, Sec. 191) have been unsuccessful. Federal Courts have consistently held that the claim of priority under this provision is modified and restricted by Section 64 of the Bankruptcy Act.

> *United States* v. *Birmingham Trust & Savings Co.*, 258 F. 562 (5th Cir. 1919); cert. den. 251 U. S. 550.

It might well be queried whether the overriding importance of Section 64 does not likewise take precedence over Section 3670, and implementing sections, of the In-

ternal Revenue Code of 1939. In view of the inequities created by the decision below, logic would indicate that any conflict between the Bankruptcy Act and other statutory provisions should be resolved in favor of the superiority of the Bankruptcy Act.

The impact which the present interpretation of Section 3672(a) will have on the distribution of bankrupt assets among taxing authorities, if all Circuits follow the lead of the Third Circuit, is made starkly clear from a consideration of the figures set forth in the Tables of Bankruptcy Statistics, published by the Administrative Office of United States Courts. Table 5f of the Tables for the fiscal year ending June 30, 1959 shows that $7,050,803.25 was paid to *all* taxing authorities under the fourth priority of Section 64. Of this sum, $1,006,913.46 was attributable to the Third Circuit.

What will happen if all the Circuits join in holding that the filing of a claim for unpaid taxes by the United States (in the absence of recording) constitutes the claimant a lien holder? Instead of all tax claimants, from the Federal government to the lowly—but important—municipal borough sharing *pari passu* under Section 64, the United States must first be paid in full.

The Tables referred to above do not break down the priority tax creditors, but petitioners urge that judicial notice be taken of the fact that in the average case, the United States would take the balance of the fund to the exclusion of the States and municipalities.

The result of the determination below, if followed throughout the Circuits, would, as a practical matter, deprive State and municipal governments of their lawful share of taxes due and owing. Certainly, this is not the social or economic result envisioned by Congress when it adopted the Bankruptcy Act. *Vide*: *In the Matter of Green*, 124 F. Supp. 481, at 482 (D. C., N. D. Ala. 1954).

**(b) The observation made by this Court in *United States* v. *Gilbert Associates* requires classification.**

Many cases have discussed the nature and extent of the Trustee's rights delineated in Section 70e, and they are consistent in the conclusion that the status of "judgment creditor" is thereby attained.

*Salkind* v. *Dubois*, 105 F. 2d 640 (3rd Cir. 1937);
*Sampsell* v. *Straub*, 194 F. 2d 228 (9th Cir. 1952); cert. den. 343 U. S. 927;
*McKay* v. *Trusco Finance Co. of Montgomery, Alabama*, 198 F. 2d 431 (5th Cir. 1952);
*In Re Lustron Corp.*, 184 F. 2d 789 (7th Cir. 1950); cert. den. 340 U. S. 946;
*In Re Ripp*, 242 F. 2d 840 (7th Cir. 1957);
*Robbins* v. *Bostian*, 135 F. 2d 298 (8th Cir. 1943).

The text writers agree with this view.

*4 Collier on Bankruptcy* (14th Ed. 1958, Par. 70.49, pages 1410 *et seq.*;
*3 Remington on Bankruptcy* (1957), pages 557, 559;
*Seligson, Creditors' Rights* (1957), 32 N. Y. U. L. R. 708, 31 J. of Nat'l Ass'n of Ref. 113.

This Court itself said, in *Myers* v. *Matley*, 318 U. S. 622 (1943) (at pp. 624, 625):

> "The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists."

In 1953, however, this Court determined, in *United States* v. *Gilbert Associates*, 345 U. S. 361, that judgment

creditor status created by a fiat of *State law* was not within the meaning of the phrase "judgment creditor" as used in Section 3672. In that case, the Court was confronted with the problem of priority between a Federal tax claim and a tax lien of the Township of Walpole, New Hampshire, assessed before the recording of the Federal claim. The Supreme Court of New Hampshire held that under the law of that State, the assessment of such a tax was in the nature of a judgment and that the Township was a judgment creditor within the meaning of the cited Federal statute. On review, the position of the United States prevailed.

In the body of the *Gilbert* opinion, the statement was made (at page 364) that "In this instance, we think that Congress used the words 'judgment creditor' in Section 3672 in the usual, conventional sense of a judgment of a court of record since all states have such courts."

Relying upon the *Gilbert* decision, the Court of Appeals for the Second Circuit reversed its prior position (see *Constance* v. *Harvey*, 215 F. 2d 571 (1951) and *United States* v. *Sands*, 174 F. 2d 384 (1949)) and, with the Ninth Circuit, now holds that a Trustee is not a judgment creditor under Section 3672.

> *Burst* v. *Sturr*, 237 F. 2d 135 (2nd Cir. 1956);
> *United States* v. *England*, 226 F. 2d 205 (9th Cir. 1955).

As pointed out above, *Gilbert Associates* dealt with the position of a Town vis-a-vis the United States, and the concern of the Court over the need for uniformity in application is evident from its statement at page 364 that:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore a 'judgment creditor' should have the same application in all the states."

Pursuant to the constitutional mandate, Congress adopted the Bankruptcy Act of 1958 called "An Act to Establish a Uniform System of Bankruptcy Throughout the United States." Except for the various amendments adopted thereafter, the original statute still provides for a "uniform system of bankruptcy" in relation to matters affecting the rights of all persons who come into the Bankruptcy Court. Hence, the objection voiced by the Court in the *Gilbert* case would not apply with respect to a Trustee in Bankruptcy—since the Federal Courts would ultimately determine the validity and extent of the "lien" which may affect assets in the custody of the Bankruptcy Court.

It should be noted that (1) *Gilbert Associates* was a non-bankruptcy case, and (2) the decision turned on the apprehension by the Supreme Court that the uniformity in collecting Federal taxes would be destroyed if the Town's contention was upheld. But no such objection could arise in a contest between a Trustee in Bankruptcy and the United States with respect to collection of Federal taxes. The Trustee occupies the status of an "ideal" or "perfect" lien creditor by force of the Bankruptcy Act itself. He needs no supporting state statute to give him that status. Hence, we submit that the issue raised in the *Gilbert* case is not dispositive of the issue on this petition.

It is significant to note that the Third Circuit was itself disturbed as to the rationale of the *Gilbert* opinion. The Third Circuit agreed with the petitioners in the first instance, for its initial opinion stated (Appendix, A-39):

> "The trustee in the case at bar contends that under Section 70c of the Bankruptcy Act there is no danger of heterogeneity since it is the federal law, not state law, that creates the judgment creditor status. A careful reading of the Gilbert opinion compels us to agree with the trustee and we cannot accept the reason underlying Brust v. Starr (sic), and United States v. England, *supra*. Compare United States v. Cargill, 218 F. 2d 556, 559-60 (1

> Cir. 1955), which also expresses the view that the basis of the Gilbert decision was the need for uniformity."

The final opinion of the Third Circuit receded from the view that the basis of *Gilbert* was the need for uniformity, and, quoting *Gilbert* (that "In this instance, we think that Congress uses the words 'judgment creditor' in Section 3672 in the usual, conventional sense of a judgment of a court of record since all states have such courts"), expressed the conviction that "this language is decisive." (A-11).

In view of the state of uncertainty which seems to exist with respect to the meaning and application of the *Gilbert* opinion, it is respectfully urged that clarification of this opinion is imperative for the guidance of the Bankruptcy Courts in the administration of the Bankruptcy Act.

**(c) Legislative intent to confer judgment creditor status on the Trustee is clearly shown.**

Consideration of the report accompanying the 1950 amendments to Section 70c (which expanded the rights of a Trustee in Bankruptcy generally), and the current proposed amendments, leads inexorably to the conclusion that Congress intended the Trustee to have the status of a "judgment creditor" within the meaning of Section 3672(a).

H. R. 1293, 81st Congress, First Session (1949) states (1950 U. S. Cong. Service, p. 1985), with respect to the purposes of the bill which resulted in the 1950 amendment to Section 70c of the Bankruptcy Act:

> "(b) Section 2 of the bill amends section 70c of the Bankruptcy Act, dealing with the general rights of a trustee in bankruptcy, and is essentially correlative to the amendment to section 60a, effected by section 1 of the bill. Under existing law, a trustee, as to all property in the possession or under the

> control of the bankrupt at the date of bankruptcy, is deemed vested, as of the date of bankruptcy, with all the rights of a creditor then holding a lien by legal or equitable proceedings, and, as to all other property, with the rights of a *judgment creditor* then holding an unsatisfied execution.
>
> "'In view of the amendment made to 60a as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to *all of the bankrupt's property*, and section 2 of the bill so amends section 70c. * * * '"

The statement in this House Report contains the following significant language (op. cit., p. 1986):

> "It follows from these broad general principles, as well as from the basic provisions of the Bankruptcy Act itself, that—
>
> (A) a trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor, with all such a creditor's remedies (Bankruptcy Act, sec. 70); * * *"

The report recently filed by the Committee on the Judiciary of the House of Representatives on pending legislation sheds clear light on the intent of Congress on the status of a Trustee. House Report 745, 86th Congress, First Session, page 9, has this to say with respect to a redraft of Section 70c:

> "As a result of several recent decisions, it would appear that the courts are of the view that the trustee does not have the status of a judgment creditor for the purposes of section 6323. The direction of judicial thinking is discernible from the decision in *United States* v. *Gilbert Associates, Inc.* (345 U. S. 361 (1953)) and *United States* v. *Acri* (348 U. S. 211 (1955)). In *Gilbert*, the court upheld the validity of the Federal tax lien against a prior lien which under New Hampshire law was given the status of a judgment. In *Acri*, the court similarly upheld the Federal tax lien against a prior *attachment* lien which under the law of Ohio was deemed to be 'an execution in advance'. The rationale of the court's

decisions is that a uniform application of the Federal tax law requires that the term 'judgment creditor' be defined in the 'usual conventional sense of a judgment of a court of record' which is common to all states (*United States* v. *Gilbert, supra*, at 364).

"Although these cases did not involve the interrelationship of the Internal Revenue Code with the Bankruptcy Act, the limitation of the term 'judgment creditor' to one holding a judgment of a court of record was subsequently extended to the application of Section 70c. In *Brust* v. *Sturr* (237 F. 2d 135 (1956)), the Second Circuit on the basis of the *Gilbert* case reversed the position which it had previously taken in *United States* v. *Sands* (174 F. 2d 384 (1949)), and held that the trustee was not a judgment creditor within section 3672 of the Revised Statutes (now sec. 6323 of the Internal Revenue Code). This view had already been taken by the Sixth Circuit in *In re Taylorcraft Aviation Corporation* (168 F. 2d 808 (1948)), and by the Ninth Circuit in *United States* v. *England* (226 F. 2d 205 (1955)).

"The effect of these decisions is that the Federal Government's unrecorded tax lien prevails over the rights of the trustee under section 70c. *This would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor.*"

The Committee indicates that in order to eliminate the obvious misconception that has arisen in connection with the foregoing amendment of 1950, the proposed bill specifically gives the Trustee the status of a "judgment creditor." It is submitted that, commendable as this legislation may be, logic impels the conclusion that even under the statutory language which is presently found in Section 70c, the Trustee has all the rights, and more, of a "judgment creditor." As Professor Seligson says in *Creditors' Rights*, 32 N. Y. U. L. R. 708, 31 N. of Nat'l Ass'n of Ref. 113:

"It is immaterial that the trustee is not described as a 'judgment creditor' in the statute if Congress intended to give him that status with all the rights,

> remedies and powers flowing therefrom. The trustee is the ideal judicial lien 'creditor' and he enjoys that status whether or not such a creditor exists. The greater includes the lesser. Hence, the ideal judicial lien creditor must necessarily be a 'judgment creditor.'
>
> "That Congress intended to give the trustee the status of a 'judgment creditor' is perfectly plain * * * ."

It is therefore urged that the legislative intent of Congress is clear, and that consequently, a Trustee in bankruptcy does have the status of a "judgment creditor" within the meaning of Section 3672(a) of the Internal Revenue Code of 1939.

**(d) The United States is not a lien claimant within the meaning of Section 3670 of Internal Revenue Code of 1939.**

According lien status to the Government's claim in the second category[2] on the facts of the case at bar, is contrary to the literal wording of the applicable statute.

Succinctly excerpted, Sections 3670 and 3671 of the Internal Revenue Code of 1939 impress a lien upon all property belonging to a person liable to pay any tax, if such person "neglects or refuses to pay" such tax "after demand", such lien to arise "at the time the assessment list was received by the collector." By the fiction of 'relation back", the Third Circuit determined all the above elements had been met. However, the Third Circuit itself has stated, with respect to the filing provisions contained in the predecessor to Section 3672, that:

> "Notwithstanding its failure to comply with the requirements of the very act creating its lien, the United States contends its lien is entitled to priority in this case.

---

[2] On the claims amounting to the sum of $27,195.54 where the "demands" were made after bankruptcy.

> "This contention cannot be sustained. Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that 'the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' • • • Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded. • • •
>
> "It is a well established doctrine that a clear unambiguous statute must be literally construed. • • • "
> *United States* v. *Beaver Run Coal Co.*, 99 F. 2d 610, 612 (1938).

It has also been stated that the Bankruptcy Act has set up a complete, well-coordinated scheme for the accomplishment of equal distribution of the bankrupt's property among his creditors, and that the plan is not to be varied by exceptions found outside the act.

> *United States* v. *Sampsell*, 153 F. 2d 731 (9th Cir. 1946);
> *United States* v. *Sands*, 174 F. 2d 384 (2nd Cir. 1949).

Further, it has been stated in *In re Lustron*, 184 F. 2d 789 (2nd Cir. 1950); cert. den. 340 U. S. 946, that (page 794):

> "The various provisions of the Act reflect a well coordinated general plan for the accomplishment of equal distribution of the bankrupt's property amongst the bankrupt's creditors. The trustee, as the hands of the court, collects the assets, protects them, and brings them before the court for final distribution; he is trustee for all who have interests, according to those interests • • • Once a petition has been filed, the court's exclusive and paramount jurisdiction extends to all the bankrupt's property, except as otherwise provided in the Act • • • Upon the filing

> of a petition the custody of the bankruptcy court attaches over all the property in its actual or constructive possession * * * "

Of particular import is *In Re Lambertville Rubber Co.*, 111 F. 2d 45 (3rd Cir. 1940) where the Court said (page 49):

> "* * * The District Court refused the surcharge because it was of the opinion that since the United States and the State of New Jersey could have perfected their liens their claims must be treated as if they had done so. We cannot approve such a principle. A tax lien is created by doing certain acts provided by statute. If those acts are not accomplished, no lien comes into being."

It has heretofore been held by this Court in *Goggin* v. *Division of Labor Law Enforcement, State of California*, 336 U. S. 118, 125-126 (1949), that the Government's rights against the bankrupt's estate are "determined at the time of bankruptcy" and that the filing of a petition in bankruptcy fixed the line of cleavage with reference to the condition of the bankrupt's estate.

> *Everett* v. *Judson*, 228 U. S. 474 (1913);
> 4 *Collier on Bankruptcy*, (14th Ed. 1958), Par. 67.26, page 277.

It is submitted that the recognition by the Third Circuit of an "inchoate lien" which is perfected by a "demand" in the form of the mere filing of a claim with the Referee *after* the petition has been filed, does violence to the literal language of the relevant statute, and runs contrary to the spirit of the Bankruptcy Act. Reliance by the Circuit on *United States* v. *Ettelson*, 159 F. 2d 193 (7th Cir. 1947), where bankruptcy had not intervened prior to the filing of a claim for taxes in a State Probate Court, is a slender reed in a situation where bankruptcy *had* occurred before the "demand."

## 2. The holdings of the Second, Third and Ninth Circuits conflict with the holdings of the Fifth, Seventh and Eighth Circuits.

The Second, Third and Ninth Circuits now hold that a Trustee in bankruptcy is not a "judgment creditor" under Section 3672.

> *Brust* v. *Sturr*, 237 F. 2d 135 (2nd Cir. 1956);
> *In the Matter of Fidelity Tube Corporation*, — F. 2d — (3rd Cir. 1960);
> *United States* v. *England*, 226 F. 2d 205 (9th Cir. 1955).[3]

On the other hand, it was held by the Fifth Circuit in *B. F. Avery and Sons Company* v. *Davis*, 226 F. 2d 942 (1955) that "the rights" of a bankruptcy trustee are those of a "judgment creditor"; and in *McKay* v. *Trusco Finance Co., etc.*, 198 F. 2d 431 (1952) that "the trustee • • • was in the position of a judgment creditor • • •." The same Circuit stated in *Brookhaven Bank & Trust Company* v. *Gwin*, 253 F. 2d 17, 23 (1958) that:

> "• • • the 'strong-arm clause' of Section 70c • • • vested in the trustee all of the rights, remedies and powers of a creditor, whether existing or not, who held or could have obtained a lien by legal or equitable proceedings."

In like tenor, the Seventh Circuit said in *In re Lustron*, 184 F. 2d 789, 793 (1950), cert. den. 340 U. S. 946, with respect to Section 70c, that:

> "Under the section, as amended by the Act of March 18, 1950, the trustee is also vested, as of the date of bankruptcy, with all the rights, remedies and powers

[3] It should be noted that in *Brust* v. *Sturr* the determination of the Second Circuit turned on the fact that the United States had physically seized the property prior to bankruptcy. Hence the seizure was *in lieu of recording*.

> of a creditor holding a lien thereon, legal or equitable, whether or not such creditor exists, as to all property of the bankrupt, whether or not coming into possession or control of the court."

In a footnote to that statement (footnote 1) the Court said:

> "The language of the amendment is all inclusive, thus embracing in the terms 'legal or equitable', a judgment creditor armed with an execution, specifically mentioned in the section prior to the amendment."

This position was reaffirmed and restated in *In re Ripp*, 242 F. 2d 849 (7th Cir. 1957), when the Court said (at page 852):

> "Under Sec. 70 of the Bankruptcy Act, 11 U. S. C. A. § 110 * * * the trustee is vested * * * under subsection c, with 'all the rights, remedies, and powers of a creditor then holding a lien * * * whether or not such a creditor actually exists.' * * * From the time of the filing of the petition, the assets are in *custodia legis* and over them the bankruptcy court has exclusive jurisdiction and the sole right to determine the validity of any and all alleged liens thereon * * *.
> "So here, when the trustee in bankruptcy was appointed, his title to all assets in the bankrupt's custody, possession or control passed to him; and, in addition, he was vested with all the rights of judgment creditors armed with execution liens. The court thereby obtained jurisdiction of the *rem*, exclusive custody over it."

The Eighth Circuit, in *Robbins* v. *Bostian*, 135 F. 2d 298 (1943), said with respect to the status of a Trustee in bankruptcy (at page 303):

> "His position is that of a judgment creditor who had perfected a lien * * * by legal or equitable means * * *."

## Summary

The second sentence of Section 70c reads as follows:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

By force of this provision, the Trustee was put in a position, ever since the amendment in 1910, to attack every type of secret lien. Can it be logically asserted that the Trustee is a "judgment creditor" against the world, excepting, however, the United States?[4]

It has been stated of the precursor of this section that it conferred upon the Trustee the status of "the ideal creditor, irreproachable and without notice, armed *cap-a-pie* with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings."

4 *Collier on Bankruptcy* (14th Ed. 1958) P. 1410.

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[4] See H.R. 745; 86th Congr. 1st Session, pp. 16, 17. To quote "The standing of a judgment creditor is one which the trustee was intended to have from 1910 onw rd and which is expressly conferred upon him by the amendment to section 70c in this bill."

See also Indiana Law Journal, Vol. 35 No. 3 (spring issue) as to the effect of the *Fidelity* case with respect to other tax claims.

## CONCLUSION

The decision by this Court in *Gilbert* involved a non-bankruptcy case. However, the broad general language that under the provisions of Section 3672(a) of the Internal Revenue Code of 1939 a judgment creditor must be a "conventional" judgment creditor, has led to uncertainty and confusion in the lower Federal Courts and the Circuits as to the application of that yardstick to Trustees in Bankruptcy. By reason of the foregoing, we respectfully submit that this petition should be granted.

Respectfully submitted,

ALLAN L. TUMARKIN,
*Attorney for Petitioners.*

# APPENDIX

## Internal Revenue Code 1939

§ 3670. Property subject to lien

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448."

§ 3671. Period of lien

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449."

§ 3672. Validity against mortgagees, pledgees, purchasers, and judgment creditors

"(a) In validity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *"

## Bankruptcy Act Section Seventy (11 U. S. C. § 110)

§ 70. Title to property.

"c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

## Judgment of Third Circuit, Filed May 3, 1960

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12837

IN THE MATTER OF FIDELITY TUBE CORPORATION,
*Bankrupt.*

BOROUGH OF EAST NEWARK, AND RAYMOND J. OTIS, AS TRUSTEE IN BANKRUPTCY OF FIDELITY TUBE CORPORATION,
*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed May 3, 1960.

Attest:

IDA O. CRESKOFF,
*Clerk.*

Received & Filed May 3, 1960, Ida O. Creskoff, Clerk.

**Final Opinion of Third Circuit**
**Filed May 3, 1960**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 12,837

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IN THE MATTER OF FIDELITY TUBE CORPORATION,
*Bankrupt.*

BOROUGH OF EAST NEWARK, AND RAYMOND J. OTIS, AS TRUSTEE IN BANKRUPTCY OF FIDELITY TUBE CORPORATION,
*Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

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Argued May 26, 1959

Reargued December 7, 1959

Reargued March 8, 1960

Before BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, FORMAN, *Circuit Judges*.

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OPINION OF THE COURT ON REHEARING

(Filed May 3, 1960)

By BIGGS, *Chief Judge*.

After attempting unsuccessfully to make an arrangement under Chapter XI of the Bankruptcy Act, as amended, 11 U.S.C.A. § 701 *et seq.*, Fidelity Tube Corporation was adjudicated a bankrupt on February 9, 1954. In the ensuing proceedings the United States filed a claim covering taxes

in three categories[1] alleged. One category consisted of claims in respect to which assessments and demands had been made prior to the adjudication. The second category consisted of claims in respect to which assessments had been made prior to bankruptcy but as to which demands, if any, were made after the adjudication. The third category consists of claims in respect to which assessments and demands were made after adjudication. The United States concedes that it does not have a lien as to the claims described in the third category set out above. As to the claims in the first and second categories, the United States asserts that it is a lien creditor for reasons stated hereinafter. The trustee contends as to the claims in categories one and two as stated above that they were not claims secured by liens but were entitled to priority only under Section 64a(4) of the Bankruptcy Act, 11 U.S.C.A. § 104(a)(4).

The Referee held that the trustee was a "judgment creditor" within the purview of Section 3672 of the Internal Revenue Code of 1939[2] and that therefore recording of notice was a prerequisite if the claims of the United States were to be accorded liens valid against the trustee. It was conceded by the United States that no notice was filed as required by Section 3672 and the Referee accordingly gave the claims of the United States, as stated above, priority only under Section 64a(4) of the Bankruptcy Act. A petition for review was filed by the United States. The court below reversed the Referee. See 167 F. Supp. 402 (1958). The trustee has appealed.

Section 3670 of the Internal Revenue Code of 1939 provides that the United States shall have a lien on all

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[1] The claims were based on Federal Unemployment, Withholding, and Federal Insurance Contribution Act (Social Security) Taxes.

[2] The Internal Revenue Code of 1939 applies to all aspects of this case. 26 U. S. C. A. § 7851(a)(6)(B).

property and rights to property belonging to any person liable to pay any tax who refuses to pay such tax on demand. Section 3671 states that the lien shall arise at the time of the assessment and shall continue until the liability is satisfied or becomes unenforceable by reason of lapse of time.

Section 3672(a) provides for the filing of notice if liens are to be valid as against mortgagees, pledgees, purchasers, or judgment creditors.[3]

The trustee contends that Section 70c of the Bankruptcy Act, 11 U.S.C.A. § 110(c), gives the trustee a status equivalent to that of a judgment creditor, *i.e.*, a creditor who has obtained a judgment in a court of record.[4] The United States contends that under Section 70c the trustee is a "fictitious" judgment creditor, not the equivalent of one who has obtained a judgment in a court of record and therefore the trustee is not entitled to prevail against the United States.

We are confronted, therefore, in respect to the claims in category one, with a conflict between two federal policies. On one side there is the congressional intent to give the United States maximum assistance in collecting revenues. This intent is embodied in the lien laws set out in Sections 3670-3672 of the Internal Revenue Act of 1939. Opposing this is the policy of increasing the size of a bankrupt's

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[3] Section 3672(a) provides in part: "* * * [the] lien [imposed by section 3670] shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector. * * *"

[4] Section 70c, 11 U. S. C. A. § 110(c), provides in part: "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

estate available to unsecured creditors as expressed by Section 70c and other sections of the Bankruptcy Act. The court below concluded that United States v. Gilbert Associates, 345 U.S. 361 (1953), and other authorities required this conflict to be resolved in favor of the United States.[5] The appeal at bar followed. But aside from the issue as to the trustee's status as judgment creditor there is another question which must be determined: *viz.*, whether the claims of the United States falling in category two are secured by liens. This question is whether the fact that the District Director filed claims with the Referee can be considered compliance with the demand requirement of Section 3670 of the Internal Revenue Code.[6] We will deal with this question first.

The Referee in his decision, under the heading "Finding of Fact", stated the following: "The United States Treasury Department also proved that its claims have a lien status under 26 U.S.C. 6321 and 6322,[7] but such claims were not filed or recorded as required by 26 U.S.C. 6323 in order to make them effective as against judgment creditors." This is not a finding of fact but is a conclusion of law. The Referee did not pass specifically on the issue of whether the United States made demand for payment though perhaps the decision of this issue was inherent in his order. Under the Referee's view of the law it was not necessary that he discuss this question for if the trustee

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[5] For a further discussion of this problem see 4 Collier, Bankruptcy ¶ 67.24 n.6a.

[6] Section 3670 provides: "If any person liable to pay any tax neglects or refuses to pay the same *after demand*, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." [Emphasis added.]

[7] The statutory references are to sections of the Internal Revenue Code of 1954. See note 2, *supra*.

had the status of a creditor who had procured a judgment, the claims of the United States were not entitled to prevail against the trustee.

It is apparent that the issue of demand for payment was argued before the Referee since it was discussed in the briefs of the parties. The Trustee and the Borough of East Newark did not seek a review of the decision of the Referee on this point and therefore the finding of the Referee reached the court below unchallenged. But we cannot perceive how the trustee or the Borough could have appealed from the Referee's decision on the demand point since the order of the Referee was in their favor. We cannot tell on the instant record whether or not the issue of demand was argued before the trial judge on the hearing on the petition for review since we do not have the briefs or a record of the oral argument before us. But in its opinion, 167 F. Supp. at p. 403, the court below stated that "Its [the United States'] lien is valid and is entitled to payment out of available proceeds prior to a distribution to priority claimants." The trial judge reversed the Referee on the issue of the status of the trustee as judgment creditor and remanded the cause for proceedings not inconsistent with his opinion. We are of the opinion that the issue of the demand by the United States for payment of the claims in category two was before the court below and was adjudicated in favor of the United States. It would therefore appear to be before this court for adjudication on this appeal.

We must therefore decide three questions: (1) was a demand made by the United States for payment of its claims in the second category in conformity with Section 3670 of the Internal Revenue Code of 1939; (2) if a demand was validly made, is the United States entitled to prevail as a lien claimant on the claims under the second category against the trustee and the Borough; and (3) is the United States entitled to prevail against the trustee and the Bor-

ough on its claims in the first category? The second and third questions will be determined by identical principles of law.

As to question (1) as set out in the preceding paragraph, it is clear that assessments were made on the claims in the second category before bankruptcy but demands for payment, if any, were made after adjudication and then only by the filing of formal claims for payment by the Collector with the Referee in Bankruptcy. If such claims would otherwise meet the requirements of Section 3670 of the Internal Revenue Code do the intervening bankruptcy proceedings render inoperative the provisions of Section 3671 which ordinarily would confer lien status?

As we have stated Section 3670 provides that when a person liable to pay a tax neglects or refuses to pay it "after demand" a lien arises in favor of the United States. Section 3671 provides in pertinent part: "Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the Collector . . . ." It is the contention of the United States that the filing of the claims with the Referee by the Collector were effective demands and that these demands relate back to the time of the assessment, admittedly prior to the adjudication. In respect to the filing of a claim in a bankruptcy proceeding as constituting an effective demand we find a helpful analogy in the decision of the Court of Appeals for the Seventh Circuit in United States v. Ettelson, 159 F.2d 193, 196 (1947). In that case a claim was filed with a Probate Court against the estate of the deceased taxpayer and this was treated by Circuit Judge (later Mr. Justice) Minton as the equivalent of the demand required by Section 3670. In the case at bar as in Ettelson, the demand for payment was made at the only place that

it could be made, *i.e.*, in the bankruptcy proceeding.[5] Compare, however, In Re Crockett, 150 F. Supp. 352 (N.D. Cal. 1957), which holds by inference that a claim for taxes by the United States in a bankruptcy proceeding is not a demand within the meaning of Section 3670. See and compare also Sherman B. Ruth, Inc. v. O.S.V. The Marie and Winifred, 150 F. Supp. 630, 632 (D. Mass. 1957); In Re Holdsworth, 113 F. Supp. 878, 879 (D.N.J. 1953), and 9 Mertens, Law of Federal Income Taxation § 54.40. We have carefully considered these authorities but we think that logic compels us to follow the holding of the Court of Appeals for the Seventh Circuit in Ettelson. It is clear that if bankruptcy had not intervened the United States would have had a valid lien if demand was made prior to the date when the assessment became unenforceable by reason of lapse of time and we can find no provision of the Bankruptcy Act which would prevent a lien arising in favor of the United States under Sections 3670 and 3671 because of a delayed demand by the District Director.

In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the demand is made the lien relates back to the date of the assessment, in the case at bar to a time prior to bankruptcy. Plumb, Federal

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[5] The District Director of Internal Revenue in his claim filed with the Referee did not assert liens. He claimed only that the United States was entitled to priority of payment under Section 64 of the Bankruptcy Act. The fact that the District Director did not assert that the United States possessed liens is immaterial. If the claims fall within the purview of Sections 3670 and 3671 of the Internal Revenue Code, as we are of the opinion they do, the District Director is not required to assert a lien or liens. He has made claims on behalf of the United States and the applicable statutes give the claims lien status.

Tax Collection and Lien Problems (Second Installment), 13 Tax L. Rev. 459, 488 (1958) states: "Furthermore, even if notice and demand have not been made before bankruptcy, they may be made thereafter and will relate back to perfect the lien arising upon the prior assessment." See also Macatee, Inc. v. United States, 214 F.2d 717, 719 (5 Cir. 1954).[9]

This brings us to the second and third questions posed above, which as we have said, are governed by identical principles of law. Is the trustee in bankruptcy a "judgment creditor" within the purview of Section 3672? Our ruling must turn in large part upon an interpretation of the decision in United States v. Gilbert Associates, *supra*. In the Gilbert case the Supreme Court was confronted with the problem of priority between a federal tax lien and a tax lien of the Township of Walpole, New Hampshire, assessed before the recording of the federal lien. The Supreme Court of New Hampshire held that under the law of that State the assessment of such a tax was in the nature of a judgment and that the Township was a judgment creditor within the meaning of Section 3672 of the 1939

[9] Section 67b. of the Bankruptcy Act, 11 U. S. C. A. § 107(b), seems to contravene the contention of the Borough of East Newark and the trustee that the adjudication cut off the right of the United States to perfect its lien. Section 67b. provides that notwithstanding the provisions of Section 60 of the Bankruptcy Act statutory liens for taxes owing the United States may be valid against the trustee. The last sentence of Section 67b, states that where by the laws of the United States such liens are required to be perfected and arise but are not perfected before bankruptcy, "[T]hey may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements * * *" of the laws of the United States. The Borough of East Newark contends that the word "may" is permissive and that for the statute to effectively authorize the validation of the liens of the United States the word employed should have been the mandatory "shall". We are unable to find any adequate support for this proposition in the pertinent authorities.

Code. See Petition of Gilbert Associates, Inc. 97 N.H. 411, 90 A.2d 499 (1952). The Supreme Court of the United States disagreed, holding that judgment creditor status created by a fiat of state law was not within the meaning of the phrase "judgment creditor" as used in Section 3672. Cf. United States v. Aeri, 348 U.S. 211 (1955). Relying on the Gilbert decision, the Second and Ninth Circuits respectively held that a trustee in bankruptcy was not a "judgment creditor" under Section 3672. Burst v. Sturr, 237 F.2d 135 (2 Cir. 1956);[10] United States v. England, 226 F.2d 205 (9 Cir. 1955).

The trustee in the instant case argues that the Supreme Court's decision in Gilbert was motivated by a desire to procure uniformity among the States in determining questions relating to priority of payment of lien claims and that the Supreme Court ruled as it did because it feared that if each State was left free to designate who was or who was not a "judgment creditor" under their respective laws there would be lack of uniformity. The trustee contends that under Section 70c of the Bankruptcy Act there is no danger of heterogeneity since we are construing federal and not State law and that therefore the Gilbert decision is not apposite. But the Supreme Court stated, 345 U.S. at p. 364, "In this instance, we think that Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record since all states have such courts." This language is decisive. It is true that the authorities cited do not deal with the interrelationship of the Internal Revenue Code with the Bankruptcy Act but we fail to see how the term

[10] Burst v. Sturr, 237 F. 2d 135 (2 Cir. 1956), seems to alter the position taken in United States v. Sands, 174 F. 2d 384 (2 Cir. 1949). The later decision is in line with United States v. Gilbert Associates, 345 U. S. 361 (1953).

"judgment creditor" can be given separate, divisive meanings based on the circumstances of the individual case.

We must concede that strong authority takes a contrary position particularly in view of the amendments effected to Section 70c of the Bankruptcy Act in 1950 and 1952. See 64 Stat. 26 and 66 Stat. 429. Section 70c, 11 U.S.C.A. § 110(c), as it now exists and as it existed at the time of the adjudication in the instant case provides: "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to expand the rights of a trustee in bankruptcy generally but the legislative history itself as well as the amendatory statutes leave in doubt the status of the trustee as a judgment creditor under the Internal Revenue Code. But see 4 Collier, Bankruptcy ¶ 70.49 n.3.

Moreover, there is presently pending in Congress a bill, H.R. 7242, which purports to remove any question as to the status of the trustee as a judgment creditor. See H. Rept. 745, 86th Cong., 1st Sess. p. 10. The report contains a lucid legislative history of Section 70c of the Bankruptcy Act. It is proposed by the bill to give the trustee the status of a creditor who has obtained a judgment against the bankrupt on the date of bankruptcy whether or not such creditor exists. We are of the opinion that the statute must be amended before a trustee in bankruptcy can prevail against the United States under circumstances similar to those at bar.

In the light of all the circumstances and the present state of the law we are constrained to agree with the judgment of the court below and we conclude, therefore, that the United States is entitled to prevail against the trustee and the Borough of East Newark on the issues presented. We do not find it necessary to pass on the issues which might have arisen under Section 67c, read in conjunction with Section 64a, clauses (1) and (2), of the Bankruptcy Act, 11 U.S.C.A. §§ 107(c) and 104(a), clauses (1) and (2), for no such issue is presented by the present record.[1] Accordingly the judgment will be affirmed.

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KALODNER, *Circuit Judge, dissenting.*

I would reverse the judgment of the District Court.

Stripped down to its essence the majority's holding is that a trustee in bankruptcy does not have the status of a "judgment creditor" by virtue of the provisions of Section 70c of the Bankruptcy Act as amended in 1952.[1] While the majority does not say so in so many words, that is the core of its holding that a trustee in bankruptcy is not a "judgment creditor" within the meaning of Section 3672 of the Internal Revenue Code of 1939.

In my view there just cannot be two varieties of a "judgment creditor" under separate federal statutes which

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[1] The Referee has certified that "all debts entitled to priority under Section 104(a), clauses (1) and (2), have been paid".

In view of the state of the record the statement contained in the opinion, 167 F. Supp. at p. 403, "Its [the United States'] lien [*sic*] is valid and is entitled to payment out of available proceeds prior to a distribution to priority claimants", cannot require revision for there are no outstanding claims falling within the category prescribed by clauses (1) and (2) of Section 64a.

[1] Act of July 7, 1952, c. 579, 66 Stat. 429, 11 U. S. C. A. § 110(c).

relate to such creditors. A "judgment creditor" cannot be "fish" under one federal statute and "fowl" under another. Nor does a bankruptcy trustee have a dual personality—that of a "judgment creditor" in one room of the federal legislative structure and a total absence of it in another room of the same structure.

The majority's holding seriously interferes with the administration of the bankruptcy laws because it destroys the centuries-old concept of the common law and equitable jurisprudence which says that one who has levied attachment or execution is a judgment creditor and Section 70c specifically vests a bankruptcy trustee "with all the rights, remedies and powers of a creditor then holding a lien."

Further, it repeals by judicial fiat a federal statute—Section 70c—which in the plainest of terms vests a bankruptcy trustee with the status of a "judgment creditor." Moreover, it disregards the express ruling of the Supreme Court of the United States in Myers v. Matley, 318 U.S. 622 (1943), that a bankruptcy trustee is a "judgment creditor", and lastly, it is a reversal of this Court's holding in Salkind v. Dubois, 105 F.2d 640 (1937) that the Bankruptcy Act makes the bankruptcy trustee a "judgment creditor."

In Myers v. Matley, supra, it was said (pp. 624, 625):

> "The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, *is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists.*" (emphasis supplied)

In Salkind v. Dubois, the writer of the majority opinion, there speaking for this Court, said (p. 640):

*Final Opinion of Third Circuit, Filed May 3, 1960*

"Pursuant to the provisions of section 47a(2) of the Bankruptcy Act, 11 U.S.C.A. § 75(a)(2),[2] *a trustee is deemed vested with all of the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings upon property coming into the custody of the bankruptcy court, and therefore the attempted reservation of property was void as against the trustee.*" (emphasis supplied)

Another member of this Court, Judge Hastie,[3] speaking for the United States Court of Appeals for the Ninth Circuit, in Sampsell v. Straub, 194 F.2d 228 (1952), cert. den. 343 U.S. 927, said (p. 231):

"Section 70, sub. c . . . is employed primarily to protect general creditors of the bankrupt against secret liens. *To this end the trustee is given all the rights which a creditor with a lien by legal or equitable proceedings would enjoy. The trustee unquestionably enjoys the rights of a creditor who has levied attachment or execution on the bankrupt's property.*" (emphasis supplied)

To the same effect see McKay v. Trusco Finance Co. of Montgomery, Alabama, 198 F.2d 431 (5th Cir. 1952) which cited with approval Sampsell v. Straub, supra. In doing so, it stated (p. 433):

". . . It follows that under sec. 70, sub.c of the Bankruptcy Act, the trustee in this case was in the position of a *judgment creditor* with a lien as of the date of the bankruptcy. . . . " (emphasis supplied)

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[2] The predecessor of Section 70c of the 1952 Act.

[3] Sitting by special designation.

It is true that the cases cited arose under the Bankruptcy Act prior to its 1950 and 1952 amendments but as the majority says "The legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to expand the rights of a trustee in bankruptcy generally. . . ." In this connection the following excerpts from the "Historical Note" following Section 110, 11 U.S.C.A. are pertinent.

> "1950 Amendment. Subd.(c) amended by Act March 18, 1950, to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property".
>
> . . . . . .
>
> "1952 Amendment . . . Subd(c) amended by Act July 7, 1952, § 23(c), to clarify the fact that a trustee has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner."

Section 70c, although it does not, as amended in 1950 and 1952, use the term "judgment creditor" does spell out in the most definitive language possible the elements which make the bankruptcy trustee a "judgment creditor".

As amended in 1952 (in effect when the bankruptcy petition was filed in the instant case) Section 70c provides, in part:

> ". . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The Section, as amended, has been construed, in cases arising under it, to give the trustee in bankruptcy the status of a judgment creditor in language almost identical with that used in Myers v. Matley, Sampsell v. Straub and Salkind v. Dubois, supra.

In discussing the amended Section this Court, speaking through our brother Hastie, in In re Consorto Const. Co. Inc., 212 F.2d 676 (1954), cert. den. 348 U.S. 833 said (p. 678):

> "The trustee's rights under this Section are not derivative. They are not rights of any existing creditor to which the trustee is subrogated but are independent rights, of such character as a described hypothetical creditor would have enjoyed, created by the Bankruptcy Act itself. . . ."[4]

In United States v. Eiland, 223 F.2d 118 (4th Cir. 1955) the late Chief Judge Parker stated with respect to the 1952 version of Section 70e (p. 123):

> "The effect of the section as amended is to vest the trustee, not only with rights with respect to the bankrupt's property which creditors had acquired at the date of bankruptcy, but also with all rights which creditors *might* have acquired by legal or equitable process on that date. . . ." (emphasis supplied)

In B. F. Avery and Sons Company v. Davis, 226 F.2d 942, 945 (5th Cir. 1955), it was held that "the rights" of a bankruptcy trustee are those of a "judgment creditor", and in Brookhaven Bank & Trust Company v. Gwin, 253 F.2d

[4] In Re Savre Village Manor, 120 F. Supp. 215 (D. C. N. J. 1954) it was held that a bankruptcy trustee is a "judgment creditor holding a lien", under Section 70c as amended in 1952.

17 (5th Cir. 1958), where the status of the bankruptcy trustee was at issue, it was said (p. 23):

> ". . . the 'strong-arm clause' of Section 70c . . . vested in the trustee all of the rights, remedies and powers of a creditor, whether existing or not, who held or who could have obtained a lien by legal or equitable proceedings."

The Seventh Circuit, in In Re Lustron Corp., 184 F.2d 789 (1950) cert. den. 340 U.S. 946, construed Section 70c, as amended in 1950, to vest in a bankruptcy trustee the rights of a "judgment creditor armed with an execution", and in In re Ripp, 242 F.2d 849 (1957) held Section 70c, as amended in 1952, to do likewise.

In In re Lustron, supra, it was said (p. 793):

> "Under the section [70c], as amended by the Act of March 18, 1950, the trustee is also vested, as of the date of bankruptcy, with all the rights, remedies and powers of a creditor holding a lien thereon, legal or equitable, whether or not such creditor exists, as to all property of the bankrupt, whether or not coming into possession or control of the court." In a footnote to that statement (Footnote 1) the Court said:
>
> "The language of the amendment is all inclusive, thus embracing in the terms 'legal or equitable', *a judgment creditor armed with an execution*, specifically mentioned in the section prior to the amendment." (emphasis supplied)

In In re Ripp, supra, the Seventh Circuit, with respect to Section 70c, as amended in 1952, said (p. 852):

> "Under Sec. 70 of the Bankruptcy Act, 11 U. S. C. A. § 110 . . . the trustee is vested . . . under subsection c, with 'all the rights, remedies, and powers of a

creditor then holding a lien . . . whether or not such a creditor actually exists.' . . . From the time of the filing of the petition, the assets are in *custodia legis* and over them the bankruptcy court has exclusive jurisdiction and the sole right to determine the validity of any and all alleged liens thereon. . . .

"So here, when the trustee is bankruptcy was appointed, his title to all assets in the bankrupt's custody, possession or control passed to him; *and, in addition, he was vested with all the rights of judgment creditors armed with execution liens.* The Court thereby obtained jurisdiction of the *rem*, exclusive custody over it." (emphasis supplied)

The views expressed by the four circuits in the cases cited were subscribed to by the Second Circuit prior to Brust v. Sturr, 237 F.2d 135 (1956) where it held that a trustee in bankruptcy is not a "judgment creditor" under Section 3672 of the 1939 Internal Revenue Code. Two years earlier, in Constance v. Harvey, 215 F.2d 571 (1954), cert. den. 348 U.S. 913, the Second Circuit held a bankruptcy trustee to be a judgment creditor under Section 70c as amended in 1952, stating (p. 575):

". . . under § 70, sub.c of the Bankruptcy Act the Trustee was entitled to be put in the position of an 'ideal' hypothetical creditor—Hoffman v. Cream-O-Products, 2 Cir., 180 F.2d 649, certiorari denied 1950, 340 U.S. 815, 71 S. Ct. 44, 95 L. Ed. 599. . . ."[5]

Earlier, in 1949, the Second Circuit, in United States v. Sands, 174 F.2d 384, expressed a similar view with respect to Section 70c, as then constituted.

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[5] In Hoffman v. Cream-O-Products, which incidentally, construed Section 70c prior to its 1950 amendment, the court said at page 650:

"That section [70c], as has been repeatedly held, confers the status of an ideal lien creditor on the trustee, whether such a creditor exists or not * * *"

The text writers are in accord with the view that a bankruptcy trustee is a "judgment creditor" under Section 70c as amended in 1952: Collier on Bankruptcy, 14th ed. (1958) Vol. 4, par. 70.49, pages 1410 et seq.; Remington on Bankruptcy, 1957 ed., Vol. 3, pages 557, 558, 559; Seligson, Creditors' Rights (1957) 32 N.Y.U.L.R. 708, 31 J. of Nat'l Ass'n of Ref. 113.

The majority apparently has been impelled to its view that a bankruptcy trustee is not a "judgment creditor" under Section 70c, irrespective of the powers therein vested in him because the section has not appended the definitive label "Judgment creditor" to the trustee's statutory vestments.

It says that the "language" used in United States v. Gilbert Associates, 345 U.S. 361 (1953) "is decisive" and quotes in that connection this statement (p. 364):

> "In this instance, we think Congress used the words 'judgment creditor' in 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts."

The statement quoted must be considered in the light of the two sentences which preceded it. They read as follows:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' should have the same application in all the states. . . ." (emphasis supplied)

A reading of the Supreme Court's opinion in the Gilbert Associates case discloses that the reason for its decision was the Court's desire to assure uniformity in the collection of federal taxes and its apprehension that such uniformity would be imperiled if the various states or their

subdivisions applied their own standards or criteria in determining what constitutes a "judgment creditor".

It became necessary for the Supreme Court to construe "judgment creditor" as used in Section 3672 because the statute did not define the terms or spell out its elements.

However, as it was earlier pointed out, Section 70c, as amended, clearly and concisely spells out in unmistakable language the elements which constitute the bankruptcy trustee a "judgment creditor".

The United States takes the position (in its brief) that the amended Section 70c makes a bankruptcy trustee a "constructive or statutory judgment creditor" but says that such a creditor "is not a creditor in the usual, conventional sense of a judgment of a court of record" and that "only the creditor in this conventional sense of a judgment of a court of record is within the meaning of" Section 3672. It adds the rather unique statement that "The terms of the Bankruptcy Act state that the trustee in bankruptcy *does occupy the fictitious position of a judgment creditor.*" (emphasis supplied)

All that need be said with respect to that contention is that if Section 70c makes a bankruptcy trustee a "statutory judgment creditor" such a status more than meets the requirement of a " 'judgment creditor' in the usual conventional sense of a judgment of a court of record" as specified in United States v. Gilbert Associates, supra.

Significant to this discussion is the following excerpt from the "Statement" in H.R. Rep. No. 1293, 81st Cong. 1st Sess. 4 (1949) in connection with the 1950 amendment to Section 70c:

> "Traditionally, it is the primary office of the Bankruptcy Act to protect creditors, both secured and unsecured; to marshal the bankrupt's assets; and to distribute them among his creditors equitably and ratably, in accordance with their respective rights and interests.

"It follows from these broad general principles, as well as from the basic provisions of the Bankruptcy Act itself, that—

(A) a trustee in bankruptcy occupies the position of a '*universal' judgment or lien creditor, with all such a creditor's remedies* (Bankruptcy Act, sec. 70. . . ." (emphasis supplied)

Prefacing the "Statement", the House Report, under the caption, "Purposes Of The Bill" said in part:

"(b) Section 2 of the bill amends section 70c of the Bankruptcy Act, dealing with the general rights of a trustee in bankruptcy, and is essentially correlative to the amendment to section 60a, effected by section 1 of the bill. Under existing law, a trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of the date of bankruptcy, with all the rights of a creditor then holding a lien by legal or equitable proceedings, and, as to all other property, with the rights of a *judgment creditor* then holding an unsatisfied execution.

"In view of the amendment made to 60a as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property, and section 2 of the bill so amends section 70c. . . ." (emphasis supplied)

In the "Committee Amendment" section of the House Report it is said:

"(5) . . . Section 2 is the amendment to section 70c of the act above referred to, which has been placed in the

> bill for the protection of trustees in bankruptcy as correlative to the amendment to section 60, and also to simplify, and *to some extent expand*, the general expression of the rights of trustees in bankruptcy." (emphasis supplied)

The legislative history cited makes clear the Congressional intent to vest the bankruptcy trustee with all of the rights and remedies of a "judgment creditor" armed with execution liens as of the date of the bankruptcy. As was said by Professor Seligson in Creditors' Rights, supra:

> "It is immaterial that the trustee is not described as a 'judgment creditor' in the statute if Congress intended to give him that status with all the rights, remedies and powers flowing therefrom. The trustee is the ideal judicial lien 'creditor' and he enjoys that status whether or not such a creditor exists. The greater includes the lesser. Hence, the ideal judicial lien creditor must necessarily be a 'judgment creditor.'
>
> "That Congress intended to give the trustee the status of a 'judgment creditor' is perfectly plain. . . ."

For the reasons stated I would reverse the judgment of the District Court on the ground that it erred in holding that "A trustee in bankruptcy is not a judgment creditor within the purview" of Section 3672 of the Internal Revenue Code of 1939.

Apart from the foregoing, I further disagree with the majority's holding that the United States has a lien status with respect to the claims in the second category[6] even

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[6] As the majority put it:

> "The second category consisted of claims in respect to which assessments had been made prior to bankruptcy but as to which demands, if any, were made after the adjudication."

though no demand for payment had been made prior to bankruptcy.

Section 3670 of the Internal Revenue Code of 1939 provides in part:

> "If any person liable to pay any tax *neglects to or refuses to pay the same after demand*, the amount . . . shall be in a lien in favor of the United States. . . ." (emphasis supplied)

Cognizant of the statutory requirement that a "demand" for payment must be made in order to confer a lien status on the assessment on which it is based, the majority, despite the intervention of bankruptcy before any demand was made, holds that the mere filing of a "claim" subsequent thereto, with the Referee in Bankruptcy, satisfied the statutory "demand" requirement.

Says the majority:

> "In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the demand is made the lien relates back to the date of the assessment, *in the case at bar to a time prior to bankruptcy.*" (emphasis supplied)

The sum of the majority's position is that the courts may, via a "nunc pro tunc", "relate back" a post-bankruptcy "demand" to a pre-bankruptcy "demand".

I disagree.

The majority's disposition does violence to the distribution concept and plan of the Bankruptcy Act.

As was said in United States v. Sampsell, 153 F.2d 731; (9 Cir. 1946), later reversed on other grounds, United States v. Sampsell, supra, at page 735:

> "The Act was intended to set up a particular scheme of distribution not to be varied by exceptions found out

side the Act, since to do so would interfere with a well-ordered and efficient working Act. . . . [T]he Bankruptcy Act has its own schedule of priorities intended to cover all situations within its terms and jurisdiction."

The Second Circuit expressed the same view in United States v. Sands, 174 F.2d 384 (1949), where the impact of the Bankruptcy Act on the lien provisions of the Internal Revenue Code of 1939 was concerned. Said the Court (pp. 385-86):

". . . The Statutory provisions [Section 67 of the Bankruptcy Act] for the collection of unpaid taxes show a complete scheme for the protection of the government revenues of the very kind which the bankruptcy provision is designed to uphold, even though bankruptcy ensues. . . .

"Sec. 67, sub.b, of the Bankruptcy Act preserves certain statutory liens, including those for taxes and debts owing to the United States, even though arising or perfected while the debtor is insolvent and within four months of bankruptcy; indeed, it goes further and allows the perfecting of such liens as have arisen, but have not been perfected, before bankruptcy. *By § 67, sub.c, however, such liens for taxes 'on personal property not accompanied by possession of such property' are postponed to the first two priorities of § 64, sub.a, supra, even though valid under § 67, sub.b, unless they have been enforced by sale before bankruptcy.* . . ." (emphasis supplied)

In In re Lustron Corp., supra it was said (p. 794):

"*The various provisions of the Act reflect a well coordinated general plan for the accomplishment of equal distribution of the bankrupt's property* amongst the

bankrupt's creditors. The trustee, as the hand of the court, collects the assets, protects them, and brings them before the court for final distribution; he is trustee for all who have interests, according to those interests . . . Once a petition has been filed, the court's exclusive and paramount jurisdiction extends to all the bankrupt's property, except as otherwise provided in the Act. . . . *Upon the filing of a petition the custody of the bankruptcy court attaches over all the property in its actual or constructive possession.* . . . " (emphasis supplied)

This Court has held with reference to another provision of the revenue laws—the predecessor to Section 3672 of the 1939 Internal Revenue Code—that it must be construed according to its terms. In United States v. Beaver Run Coal Co., 99 F.2d 610 (1938),[1] where the United States had not *filed* notice of its lien in accordance with the requirements of the statute, we said with respect to the failure to do so (pp. 612-613):

"Notwithstanding its failure to comply with the requirements of the very act creating its lien, the United States contends its lien is entitled to priority in this case.

"This contention cannot be sustained. Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that *'the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it,* and the *lien will extend only to persons* or conditions provided for by statute, and then only where there ha-

[1] The spokesman for the majority, Chief Judge Biggs, was a member of the panel in this case.

been at least a substantial compliance with *all* the statutory requirements.' . . . *Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded.* . . .

"It is a well established doctrine that a *clear, unambiguous statute must be literally construed.* . . ." (emphasis supplied)"

The majority's holding here that a "demand" made subsequent to bankruptcy "relates back to the date of assessment" and thus meets the requirements of Section 3670 which requires that a "demand" must be made in order for a tax lien to accrue is in direct conflict with our express ruling in In re Lambertville Rubber Co., 111 F.2d 45 (1940). We there held that there must be, ab initio, a compliance with the provisions of the revenue statutes creating tax liens in order for the latter to inure.

In that case the Commissioner had made an assessment for taxes due the United States but it was not received by the Collector of the district in which the taxpayer maintained its office or place of business. Later an involuntary petition in bankruptcy was filed against the taxpayer and a trustee was appointed. He paid the amount due the United States[2] and it later developed that the assets of the bankrupt estate were insufficient to meet expenses of administration. The court below refused to surcharge the trustee with the tax payment stated. We reversed. In

[1] To the same effect see Miller v. Bank of America, N. T. & S. A., 166 F. 2d 415, 417 (9 Cir. 1948) where it was held that Sections 3670 and the related Sections *3671* and *3672* are "clear and unambiguous" and must be "literally construed."

[2] The trustee also paid certain unemployment compensation tax claims of the State of New Jersey.

doing so Chief Judge Biggs, speaking for the Court, stated (p. 48):

> ". . . Nor may it be contended that the claim of the United States was a lien upon the property of the debtor. R.S. § 3186, May 29, 1928, c. 852, Sec. 613, 45 Stat. 875, 26 U.S.C.A. Int. Rev. Code § 3671, provides that the lien of a tax due the United States shall arise when the assessment list is received by the collector. The record of the case at bar is devoid of any evidence that an assessment list including this item of tax was ever received by the collector of the district in which the debtor maintained its office or place of business. It follows that the claim of the United States was entitled to priority simply as provided by Section 64. . . ."

With respect to the district court's citation of Section 67b of the Bankruptcy Act as permitting tax claims of the United States to be "perfected" after bankruptcy, it was said (p. 49):

> ". . . The District Court refused the surcharge because it was of the opinion that since the United States and the State of New Jersey could have perfected their liens their claims must be treated as if they had done so. *We cannot approve such a principle. A tax lien is created by doing certain acts provided by statute. If those acts are not accomplished, no lien comes into being.*" (emphasis supplied)

We adhered to the doctrine expressed in Freeman v. Mayer, 253 F.2d 295 (1958) where we held that proceeds of collection of tax obligations by the Collector of Internal Revenue were subject to priorities of the Bankruptcy Act. In this case, following the filing of a bankruptcy petition, the Collector collected from certain of the bankrupt's

creditors sums due the bankrupt at the time of bankruptcy "and not paid for at the time the Collector levied upon all of Brokol's [bankrupt's] personal property and closed its establishment." The question presented was "whether the taxing authorities may keep this money or whether they must surrender it to the trustee in bankruptcy." Our answer was that the trustee in bankruptcy, under Section 67, sub.c, of the Bankruptcy Act, was entitled to the funds so collected by the Collector because of his failure to give notice to the bankrupt's creditors from whom collection was made that "a levy is being made upon that which he [bankrupt] owes, or the service of appropriate notice upon the debtor purporting to appropriate the debt to the satisfaction of the tax lien."

The majority's holding in the instant case that "demand" made after bankruptcy may be antedated to such bankruptcy nullifies Section 64a(4) of the Bankruptcy Act. Under that Section, when bankruptcy proceedings have been instituted, tax claims of the United States which do not have a lien status at the time the bankruptcy petition is filed are not eligible to any recovery other than that granted by the Bankruptcy Act which specifies a fourth priority among general creditors after the payment of any liens which are valid against the trustee.

There the government's claims in the second category —assessments made prior to bankruptcy but as to which no "demand" was made prior to bankruptcy—did not have a lien status under the plain terms of Section 3670 of the Internal Revenue Code of 1939 which provide that in order to confer a lien status upon an assessment there must be a "demand" for payment of the assessment and a "neglect or refusal to pay" such assessment.

The majority, it may be noted parenthetically, has given no consideration to the statutory requirement of "neglect or refusal" to pay, and here it is obvious that

since no "demand" was made for payment of the assessment prior to bankruptcy there was no "neglect or refusal" to pay on the part of the bankrupt taxpayer.

The sum of my view may be stated as follows:

Section 3670 of the Internal Revenue Code of 1939 specifically provides that a lien for taxes accrues to the United States only after a "demand" for payment is made on the "person liable to pay" and he "neglects or refuses to pay", and further, that the lien when it accrues "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person"; in the instant case there was no "demand" for payment on the taxpayer, the "person liable to pay", prior to bankruptcy, nor any neglect or refusal on his part to pay, and consequently a tax lien did not accrue against property "belonging" to him and on the filing of the petition in bankruptcy the exclusive custody of the bankruptcy court attached to all of the bankrupt taxpayer's property and it being in "custodia legis" the property no longer "belonged" to the bankrupt taxpayer and accordingly there could no longer be a compliance with the provision of Section 3670 that the tax lien accrued "upon all property . . . belonging to such person."

Otherwise stated, bankruptcy acts as a "cut-off" to the making of a "demand" for payment on the "person liable to pay"; or the accrual of a tax lien against property "belonging to such person", and further, since the terms of Section 3670 are "clear and unambiguous" and its provisions extend only to the "person liable to pay" and "property belonging" to him, the notice of claims filed with the Referee, even if they can be regarded as a "demand", could not retroactively accord the status of a tax lien to the assessment on which they were based.

In Goggin v. California Labor Div., 336 U.S. 118, 125-126 (1949) it was explicitly held that the government's rights against the bankrupt estate are "determined at the

time of bankruptcy". In doing so it cited Everett v. Judson, 228 U.S. 474, 479 (1913) where it was said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition."

As stated in Collier on Bankruptcy, 14th ed. (1958) Vol. 4, para. 67.26, page 277:

> "The general rule in bankruptcy is that the filing of the petition freezes the rights of all parties interested in the bankrupt estate."

United States v. Ettelson, 159 F.2d 193 (7 Cir. 1947), cited by the majority, where a claim for unpaid taxes filed with a state Probate Court against the estate of a deceased taxpayer, was treated as the equivalent of the "demand" required by Section 3670, is totally inapposite In that case bankruptcy had not intervened prior to the "demand".

Assuming that I am in error in my view that the United States, for the reasons aforementioned, did not have any lien status with respect to its claims in the second category, it seems to me incontrovertible that these claims, for a further reason, would be subordinated to expenses of administration and preferred wage claims in accordance with the provisions of Section 64(a) pursuant to Section 67c of the Bankruptcy Act.

Section 67c(1) provides that ". . . statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, *on personal property not accompanied by possession of such property* . . . shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 64. . . ." (emphasis supplied).

Section 64(a)(1) relates to expenses of administration and Section 64(a)(2) relates to preferred wage claims.

In view of the fact that in the case at bar the schedules filed by the bankrupt disclosed that all its assets were "personal property" and the United States makes no contention that it had "possession" of such property at the time the bankruptcy petition was filed, the provisions of Section 67c (1) and Section 64(a)(1)(2) are applicable.

We specifically so held in In re Pennsylvania Central Brewing Co., 114 F.2d 1010 (1940), cert. den. 312 U.S. 685. Speaking for the Court, Chief Judge Biggs there said (p. 1012):

> "We are of the opinion that Congress has elected to treat personal property and real estate upon different bases. This is clearly one of the purposes of Section 67, sub.c. *If there is a statutory lien upon personal property not accompanied by possession . . . such liens are postponed in payment to expenses of administration and wage claims.* If however, the statutory lien is upon real estate, it is not postponed but is payable strictly pursuant to the provisions of Section 67, sub.b" [10] (emphasis supplied)

In accord is the following statement in Plumb, Federal Tax Collection and Lien Problems (Second Installment), 13 Tax L. Rev. 459, 488 (1958):

> "As against *personal property*, however, a federal tax lien not enforced by seizure or sale before bankruptcy is subordinated to administration expenses and preferred wage claims."

What has been said on this score also applies to the claims of the United States in the first category, where

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[10] See also California State Department of Employment v. United States, 210 F. 2d 242 (9th Cir. 1954).

assessment and demand were made prior to bankruptcy, since assuming arguendo, that these claims had a lien status as held by the majority, such lien merely attached to "personal property not accompanied by possession", and consequently must be subordinated to the payment of expenses of administration and preferred wage claims.

It is true that what has been said as to the subordination of the government's claims in the first and second categories to expenses of administration and preferred wage claims may be considered academic in view of the circumstance here that the administration expenses and preferred wage claims were actually paid prior to the government's claims, but the fact remains that the majority's opinion accorded to the government's claims a top priority over the expenses of administration and preferred wage claims, and its ruling in this respect may be cited as a precedent in other cases. That that is so is evident from the majority's holding "that the United States is entitled to prevail *against the trustee* and the Borough of East Newark on the issues presented." (emphasis supplied).

The District Court, as the majority points out, stated in its opinion, 167 F. Supp. at p. 403 that "[the United States'] lien is valid and is entitled to payment out of available proceeds *prior to a distribution to priority claimants.*" Further, the District Court expresly stated: "*The liens of the Government are valid as against the trustee in each case.*" (emphasis supplied). The Order of the District Court, under appeal, is in consonance with its opinion, and the majority has expressly affirmed it.

There remains this to be said.

The majority's holding gives a priority to the government's tax claims in categories 1 and 2 over the tax claims of the Borough of East Newark. Since in my view both the government's claims and the Borough's tax claims come within the fourth priority as established by Section 64(a)(4)

they must share pro rata in the funds available for distribution.

That that is so was settled in Missouri v. Ross, 299 U.S. 72 (1936) where it was said (pp. 74-75):

> "The intention clearly was to put these various governmental units in respect of their taxes upon terms of equality with one another. Since Congress was at pains to set forth the order of priority in distinct paragraphs under separate numerals, we are unable to reach any other conclusion. If it had been intended to establish priorities as among the governmental units named in the order in which they appear in the 6th paragraph [now 64a(4)], the very structure of § 64 b plainly suggests that each would have appeared under a separate numeral instead of all being grouped under a single numeral."

As Collier on Bankruptcy para. 64401 puts it:

> "General Analysis of § 64a(4).
>
> "All tax claims are placed on an equal footing within § 64, and no perference may be given to federal over state taxes, or to state over municipal taxes; if the estate is insufficient to pay all taxes in full, a *pro rata* distribution is contemplated."

For the reasons stated I would reverse the Order of the District Court and remand with directions to affirm the Order of the Referee.

Circuit Judge Hastie joins in this dissent.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

**First Opinion of Third Circuit**
**Filed May 3, 1960**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,837

IN THE MATTER OF FIDELITY TUBE CORPORATION,
*Bankrupt.*

BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE IN BANKRUPTCY OF FIDELITY TUBE CORPORATION,
*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued May 26, 1959

Before BIGGS, *Chief Judge*, and KALODNER and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed September 24, 1959)

By BIGGS, *Chief Judge*.

After attempting unsuccessfully to make an arrangement under Chapter XI of the Bankruptcy Act, as amended, 11 U.S.C.A. § 701 *et seq.* Fidelity Tube Corporation was ad-

judicated a bankrupt on February 9, 1954. In the ensuing proceedings the United States filed a claim covering taxes in three categories alleged to be due.[1] One category consisted of claims in respect to which assessments and demands had been made prior to the adjudication. The second category consisted of claims in respect to which assessments had been made prior to bankruptcy but as to which demands were made after the adjudication. The third category consists of claims in respect to which assessments and demands were made after adjudication. The United States concedes that it does not have a lien as to the claims described in the third category set out above. As to the claims in the first and second categories, the United States asserts that it is a lien creditor for reasons stated hereinafter. The trustee contended as to the claims in categories one and two as stated above that they were not claims secured by liens but were entitled to priority only under Section 64a(4) of the Bankruptcy Act, 11 U.S.C.A. § 104(a)(4).[2]

The Referee held that the trustee was in the position of a judgment creditor as defined by Section 3672 of the Internal Revenue Code of 1939, 26 U.S.C.A. § 3672,[3] and that therefore recording of notice was a prerequisite of valid liens. Notices not having been recorded, he disallowed all the claims of the United States in categories one and two. A petition for review was filed by the United States.

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[1] The claims were based on Federal Unemployment, Withholding, and Federal Insurance Contribution Act (Social Security) Taxes.

[2] The agreed statement of facts is insufficient. It does not state the times when the claims asserted by the United States arose or the pertinent taxing statutes. The record originally certified to this court did not contain the claims of the United States. We caused them to be certified and transmitted to the Clerk of this Court.

[3] The Internal Revenue Code of 1939 applies to all aspects of this case. 26 U. S. C. A. § 7851(6)(B).

The court below reversed the Referee. The trustee appealed. See 167 F. Supp. 402.

Section 3670 of the Internal Revenue Code provides that the United States shall have a lien on all property and rights of property belonging to any person liable to pay any tax who refuses to pay such tax on demand. By the terms of Section 3671 the lien arises at the time the assessment is made and continues until the liability for the assessed amount is satisfied or lapses by virtue of the statute of limitations. The provisions of this section are pertinent for reasons which will appear hereinafter. Section 3672(a), however, provides for notice if liens are to be valid as against mortgagees, pledgees, purchasers or judgment creditors.[4] Concededly no notice was given by the United States as required by Section 3672(a). The trustee contends that under Section 70c of the Bankruptcy Act, 11 U.S.C.A. § 110(c), the trustee possesses the status of a judgment creditor and that therefore the tax liens of the United States, of which notice was not given as required by Section 3672(a), are invalid as to him.[5] The United States contends that under Section 70c the trustee is only a fictitious judgment creditor and the notice requirements of Section 3672 apply only to "actual" judgment creditors; that is, parties to a court proceeding who have succeeded in procuring judgments.

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[4] Section 3672(a) provides in part: "* * * [the] lien imposed by section 3670 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *"

[5] Section 70c, 11 U. S. C. A. § 110(c), provides in part: "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

We are confronted therefore with a conflict between two federal policies. On one side there is the congressional intent to give the United States maximum assistance in collecting revenues. This is embodied in the lien laws set out in Sections 3670-3672 of the Internal Revenue Act of 1939. Opposing this is the policy of increasing the size of a bankrupt's estate available to unsecured creditors, as expressed in Section 70c of the Bankruptcy Act. The court below concluded that United States v. Gilbert Associates, 345 U.S. 361 (1953), and other authorities require this conflict to be resolved in favor of the United States.[6]

In the Gilbert case the Supreme Court was confronted with the problem of priority between a federal tax lien and a tax lien of the Township of Walpole, New Hampshire, assessed before the recording of the federal lien. The Supreme Court of New Hampshire held that under the law of that state the assessment of such a tax was in the nature of a judgment and that the Township was a judgment creditor within the meaning of Section 3672 of the 1939 Code. See Petition of Gilbert Associates, Inc., 97 N.H. 411, 90 A.2d 499 (1952). The Supreme Court of the United States disagreed, holding that judgment creditor status created by a fiat of state law was not within the meaning of the phrase "judgment creditor" as used in Section 3672. Relying on this decision, the Second and Ninth Circuits respectively held that a trustee in bankruptcy is not a "judgment creditor" under Section 3672. Brust v. Sturr, 237 F. 2d 135 (2 Cir. 1956); United States v. England, 226 F. 2d 265 (9 Cir. 1955).

The trustee in the instant case argues that the Supreme Court's decision in *Gilbert* was motivated by a desire to insure uniformity among the States in determining ques-

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[6] For a further discussion of this problem see 4 Collier, Bankruptcy ¶ 67.24 n. 6a.

tions relating to priority of payment of claims and that the Supreme Court ruled as it did because it feared that if each State were left free to designate who were or who were not "judgment creditors" under its laws there would be a lack of uniformity. The trustee in the case at bar contends that under Section 70c of the Bankruptcy Act there is no danger of heterogeneity since it is the federal law, not State law, that creates the judgment creditor status. A careful reading of the Gilbert opinion compels us to agree with the trustee and we cannot accept the reasoning underlying Brust v. Starr, and United States v. England, *supra*. Compare United States v. Cargill, 218 F. 2d 556, 559-60 (1 Cir. 1955), which also expresses the view that the basis of the Gilbert decision was the need for uniformity.

This ruling, however, by no means disposes of the instant case. It only permits us to conclude that the issue has not been foreclosed by previous decisions. We still must decide whether or not a trustee in bankruptcy is a judgment creditor under Section 3672. Of course a trustee in bankruptcy is not a "real" judgment creditor in the sense that he has sued the bankrupt and has obtained a judgment. But Section 70c purports to give the trustee all the rights of an individual who has sued the bankrupt and obtained a judgment. A judgment creditor, *i.e.*, one who has obtained a judgment in a court of record and is entitled to a lien by reason of his judgment, unquestionably is free of unrecorded United States tax liens. Support for the trustee's contention that he is a judgment creditor within the ambit of Section 3672 can be found in United States v. Sands, 174 F 2d 384 (2 Cir. 1949), although the decision went against a trustee on other grounds. In the course of the opinion, Judge Clark implicitly held a trustee to be a judgment creditor as defined by Section 3672. He subsequently altered this position in Brust v. Sturr, *supra*, but he did so only because of

what we believe to have been an erroneous interpretation of United States v. Gilbert, *supra*.

The Report of the Committee on Ways and Means of the House of Representatives to accompany H.R. 8300 (the Internal Revenue Code of 1954) p. A407, states: "Furthermore, subsection (c) [of Section 6323, the successor to Section 3672 of the 1939 Code] makes clear that particular persons shall not be treated as judgment creditors because state or Federal law artificially provides or concedes such person rights or privileges of judgment creditors, or even designates them as such, when they have not actually obtained a judgment in the conventional sense."

If this case arose under the 1954 Code we would deem the language quoted conclusive.[3] But the relevant parts of Section 70c of the Bankruptcy Act antedate the Internal Revenue Code of 1939. The 1954 Code, however, purported to make no material changes as to the status of the kind of tax liens presently under consideration, and the report indicates that Section 6323 of the 1954 Code only clarifies the meaning of Section 3672 of the 1939 Code. We deem the foregoing requires us to hold that a trustee in bankruptcy is not a judgment creditor within the meaning of Section 3672.

Our affirmance of the District Court on this issue requires us to decide another problem raised by the appeal but not ruled on by the court below: *i.e.*, the status of tax claims based on assessments and demands, where the assessments were made before bankruptcy but demands thereon were not made until after the adjudication. This issue is properly before us for the operative facts are admitted[4] and only questions of law remain for determination.

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[3] The relevant language of the two sections is substantially identical.

[4] See the stipulation of facts.

*First Opinion of Third Circuit, Filed May 3, 1960*

The United States asserts that the tax assessments, concededly made prior to bankruptcy, but upon which no demand was made prior thereto, nevertheless possess lien status. But formal claims were filed with the Referee in Bankruptcy by the Collector. Does this meet the requirements of Section 3670? We are of the opinion that the answer must be in the affirmative. The decision of the Court of Appeals for the Seventh Circuit in United States v. Ettelson, 159 F. 2d 193, 196 (1947), supplies an analogy which we think is helpful. In that case a claim was filed with the Probate Court against the estate of a deceased taxpayer and this was treated by Circuit Judge (later Mr. Justice) Minton as the equivalent of the demand required by Section 3670. In the case at bar, as in *Ettelson*, the demand for payment was made at the only place that it could be made, *i.e.*, against the bankruptcy estate.* Compare, however, In Re Crockett, 150 F. Supp. 352 (N.D. Cal. 1957), which holds that a claim for taxes by the United States in a bankruptcy proceeding is not a demand within the meaning of Section 3670. See and compare also In Re Sherman B. Ruth, Inc. v. O.S.V. The Marie and Winifred, 150 F. Supp. 630, 632 (D.C. Mass. 1957); In Re Holdsworth et al., 113 F. Supp. 878, 879 (D.C. N.J. 1953), and 9 Mertens,

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* The District Director of Internal Revenue in his claim filed with the Referee did not assert liens. He claimed only that the United States was entitled to priority of payment under Section 64 of the Bankruptcy Act. The fact that the District Director did not assert that the United States possessed liens is immaterial. If the claims fall within the purview of Sections 3670 and 3671 of the Internal Revenue Code, as we are of the opinion they do, the District Director is not required to assert a lien or liens. He has made claims on behalf of the United States and the applicable statutes give the claims lien status.

Law of Federal Income Taxation § 54.39. We have carefully considered these authorities but logic compels us to follow the holding of the Court of Appeals for the Seventh Circuit in *Ettelson*. We are convinced that the interposition of a bankruptcy adjudication does not cut off the rights of the United States and that it was the intention of Congress, under the terms of the pertinent statutes, to preserve the sanctity of the federal fisc by way of lien.

As we have said, Section 3671 of the Code fixes the time when the lien arises as the time the assessment list was received by the Collector. This was prior to the adjudication. No issue is raised here as to the adequacy or legality of the assessments.[10] It follows that the liens date back to the dates of the assessments. It is conceded further, of course, that the tax claims of the United States have not been paid. The tax liens of the United States are valid as against the trustee.

The judgment of the court below will be affirmed. The case will be remanded with directions to proceed in accordance with this opinion.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

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[10] See the agreed statement of facts, paragraph 7.

## Opinion of District Court

(167 F. Supp. 402)

MORELL, *J.*:

Is a trustee in bankruptcy a "judgment creditor" within the purview of Section 6323(a) of the Internal Revenue Code of 1954?[1]

In each case the Borough of East Newark, with a standing as a priority claimant under § 64a(4) of the Bankruptcy Act and abjuring any claim of lien for the personal property taxes due it, argued that the lien claims of the United States for taxes was invalid and that the Government claim should merely have a priority status under § 64a(4). This contention was upheld by the referee on the ground that since the Government had not filed notice of its lien claim under 26 U. S. C. A. § 6323,[2] the lien was invalid as against the trustee who was to be treated as a judgment creditor. It is unquestioned that the Government did have a lien under § 6321 when bankruptcy proceedings were instituted.

The referee was in error. A trustee in bankruptcy is not a judgment creditor within the purview of § 6323(a). The Government's claim for taxes should not have been adjudicated to be a priority claim under § 64a(4) of the Bankruptcy Act and on a parity with the tax claim of the Borough of East Newark. Its lien is valid and is entitled to payment out of available proceeds prior to a distribution to priority claimants. 3 *Collier, Bankruptcy*, pp. 2054-2056;

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[1] 26 U. S. C. § 6323. While the 1939 code, 26 U. S. C. § 3672 is applicable to these cases, the current code will be referred to because the differences between the 1954 and 1939 codes do not affect the question involved.

[2] § 6323(a). * * * the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed * * *

*Miners Sav. Bank of Pittston, Pa.* v. *Joyce*, 97 F. 2d 973, 978 (3d Cir. 1938).

The doctrine that a trustee is not a judgment creditor was first enunciated in the *Taylorcraft* case.[3] In *U. S.* v. *Sands*, 174 F. 2d 384 (2d Cir. 1949) this pronouncement was considered as a dictum not to be followed in view of the express provision to the contrary in § 70c of the Bankruptcy Act.

In 1953, the *Gilbert Associates* case was decided by the Supreme Court.[4] The New Hampshire court had decided that a town's tax assessments were, under local law, in the nature of a judgment and that therefore the town was, vis-a-vis the United States tax claim, a judgment creditor under § 3672 (26 U. S. C. A. § 6323). In reversing, the Supreme Court held that while New Hampshire was free to give its interpretation as to the nature and effect of a New Hampshire tax proceeding for the purpose of its own internal administration, the meaning of a Federal statute was for the Supreme Court, and that under that statute the local tax proceeding did not result in making the town a judgment creditor within § 3672. The following key language was used: "In this instance, we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts."

In *United States* v. *Scovil*, 348 U. S. 218 (1955), the Court ruled similarly as to the "purchaser" exception of § 3672. In holding that a landlord with distress lien under South Carolina law was not a purchaser under § 3672, the Court said: "A purchaser within the meaning of § 3672 usually means one who acquires title for a valuable consid-

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[3] *In re Taylorcraft Aviation Corporation*, 168 F. 2d 808 (6th Cir. 1948).

[4] *United States* v. *Gilbert Associates*, 345 U. S. 361.

eration in the manner of vendor and vendee. Obviously, the landlord was not a purchaser."

The question came before the Second Circuit again in *Brust* v. *Sturr*, 237 F. 2d 135 (2d Cir. 1956) and the court held that " • • • under the doctrine of *United States* v. *Gilbert Associates* • • •—a case decided subsequent to our Sands decision—we think a trustee in bankruptcy is not a 'judgment creditor' within the meaning" of § 3672.

To the same effect, see *United States* v. *England*, 226 F. 2d 205 (9th Cir. 1955), *United States* v. *Hawkins*, 228 F. 2d 517 (9th Cir. 1955), *In the Matter of Green*, 124 F. Supp. 481 (N. D. Ala., S. D 1954) and *In re Ann Arbor Brewing Co.*, 110 F. Supp. 111 (E. D. Mich. 1951, Referee). And see *Seligson, Creditors' Rights, 1957 Annual Survey of American Law*, pp. 334-336, N. Y. U., 9 *Mertens, Law of Federal Income Taxation*, § 54.46 (Zimit rev.) and *Plumb, Federal Tax Collection and Lien Problems*, 13 Tax. L. Rev. 247, 488.

Treasury Regulation § 301.6323-1(2) provides that " • • • (b) the term 'judgment creditor' means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money • • •." This construction is entitled to some consideration. *Fawcus Machine Co.* v. *United States*, 282 U. S. 374.

Pending legislation, H. R. 5195, 85th Congress, 1st Sess. (1957) which would in effect protect the trustee both as a judgment creditor and as a purchaser, *Plumb*, supra, note 572 at page 488, further supports the contention that a trustee in bankruptcy is not a judgment creditor within the purview of § 6323.

A judgment in its usual, conventional sense imports the use of judicial process, *Restatement, Judgments* §§ 1, 2, 4, 14 and 32 (1942); *Restatement, Conflict of Laws* § 429 (1934); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. 2d

855, 858 (8th Cir. 1925). It involves a claim pressed and resisted (or the opportunity for resistance) by adversaries in a court, a hearing and an adjudication. A successful claimant then becomes a judgment creditor. This is a far cry from one claiming to be a judgment creditor by legislative fiat under § 70c of the Bankruptcy Act, such "judgment" not being the usual and conventional one.

Seemingly holding that the trustee is a judgment creditor under § 6323 are the *Fisher*[5] and *Sport Coal*[6] cases. The *Fisher* case relied on the *Sands* case, supra, and was decided prior to the later decision of the Second Circuit in the *Brust* case, supra, and prior to the *Gilbert Associates* case, supra. Furthermore, the case also held that whether or not the trustee in bankruptcy was a "purchaser" under § 3672 depended on the meaning given that term by the courts of Massachusetts, contrary to the holding of the *Gilbert Associates* case, supra. And see *Ersa, Inc. v. Dudley*, 234 F. 2d 178 (3d Cir. 1956).

The *Sport Coal* case, supra, held that the trustee was a judgment creditor and his status under § 3672 was to be determined under the law of West Virginia. This runs counter to the statement of Justice Jackson in his concurring opinion in the *Security Trust* case[7] at p. 52: "The history of this tax lien statute [26 U. S. C. §§ 3670-72] indicates that only a judgment creditor in the conventional sense is protected." The Justice also concluded that the statute excluded from the provisions of this secret lien "those types of interests which it specifically included in the statute and no others."

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[5] *In re Fisher Plastics Corporation*, 89 F. Supp. 446 (D. C. Mass. 1950).

[6] *In re Sport Coal Company*, 125 F. Supp. 517 (S. D. West Va. 1954).

[7] *United States v. Security Tr. & Sav. Bk.*, 340 U. S. 47 (1950).

The *Gargill, Straub* and *Sayre Village* cases are urged by the Borough of East Newark as sufficient authority to classify the trustee as a judgment creditor.

In the *Gargill* case [8] the question was between a *mortgage* and a subsequently recorded tax lien, and the court held that the transaction in question was a conventional mortgage and would be so held uniformly throughout the States. There is nothing in the opinion which waters down the statement in the *Gilbert Associates* case, supra, that the type of judgment creditor envisioned in 26 U. S. C. § 3672 is one who is such in the usual, conventional sense.

The *Straub* case [9] was decided prior to *Gilbert Associates*, did not discuss the particular problem here involved, and, as pointed out above, the same court, in *United States* v. *Hawkins*, 228 F. 2d 517 (1955) and *United States* v. *England*, 226 F. 2d 205 (1955), held contrary to the contention of the Borough of East Newark.

The *Sayre Village* case [10] involved New Jersey statutes, N. J. S. A. 46:22-1 and 46:16-1 which provided, in part, that unrecorded agreements for the sale of real estate were void against subsequent judgment creditors without notice. The court held that the trustee in bankruptcy was a creditor with a lien under § 70c of the Bankruptcy Act, that a judgment creditor is a creditor with a lien, that the trustee did not have notice of the unrecorded purchase agreements, and that therefore the trustee's lien prevailed against the unrecorded agreements. The relevancy of this case to the question at hand escapes me.

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[8] *United States* v. *Gargill*, 218 F. 2d 556 (1st Cir. 1955).

[9] *Sampsell* v. *Straub*, 194 F. 2d 228 (9th Cir. 1951; c. d.).

[10] *In re Sayre Village Manor*, 120 F. Supp. 215 (D. C. N. J. 1954).

The suggestion, apparently made quite seriously, that this court follow the dissenting rather than the majority opinion in the *Gilbert Associates* case requires no comment.

The liens of the Government are valid as against the trustee in each case. Both cases are remanded to the referee for further proceedings not inconsistent with this opinion.

MENDON MORRILL,
*Judge, United States District Court.*

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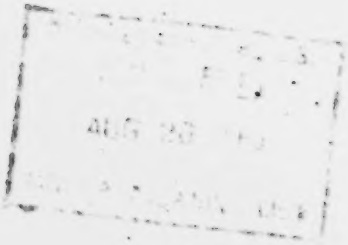

No. 269

# In the Supreme Court of the United States

OCTOBER TERM, 1960

BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE IN BANKRUPTCY OF FIDELITY TUBE CORPORATION, BANKRUPT, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

**J. LEE RANKIN,**
*Solicitor General,*
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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinions of the Court of Appeals (Pet. A–3–34) are not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1960. (Pet. A–2a.) The petition for a writ of certiorari was filed on July 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy is a "judgment creditor" within the meaning of Section 3672(a)

of the Internal Revenue Code of 1939, so that unfiled federal tax liens are not valid against him.

2. Whether the United States obtains a tax lien upon a bankrupt's property where the tax is assessed before, but demand for payment is not made until after, the adjudication in bankruptcy.

## STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 3670. PROPERTY SUBJECT TO LIEN.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C. 1952 ed., Sec. 3670.)
>
> SEC. 3671. PERIOD OF LIEN.
>
> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
>
> (26 U.S.C. 1952 ed., Sec. 3671.)
>
> SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any

mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Bankruptcy Act, c. 541, 30 Stat. 544:

Sec. 70 [as amended by Sec. 23(e), Act of July 7, 1952, c. 579, 66 Stat. 420]. *Title to property.*

* * * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

* * * * *

(11 U.S.C. 1952 ed., Sec. 110.)

STATEMENT

The Fidelity Tube Corporation was adjudicated a bankrupt on February 9, 1954 (Pet. A–3). The United States filed a claim in the bankruptcy proceedings for unpaid federal unemployment, withholding, and social security taxes. It claimed a lien

for two of these categories. In one category both assessment of the tax and demand for its payment had been made prior to adjudication in bankruptcy; in the other category the tax had been assessed before, but payment was demanded after, bankruptcy (Pet. A–3–4). Neither lien had been recorded prior to the bankruptcy adjudication.

The Referee in Bankruptcy held that the unrecorded federal tax lien was not valid as against the trustees in bankruptcy (Pet. A–4), but the district court reversed (Pet. A–43–48). The court of appeals affirmed the district court (Pet. A–35–42) and, on rehearing *en banc*, two judges dissenting, the court filed a new opinion which again affirmed the district court (Pet. A–3–34). The court held (1) that a trustee in bankruptcy is not a "judgment creditor" within the meaning of Section 3672(a) of the Internal Revenue Code of 1939, and that the federal tax lien, although not recorded, has priority over the trustee's claim; and (2) that the federal lien attached upon the assessment of the tax, even though demand for payment was not made until after bankruptcy.

## ARGUMENT

1. Section 3672(a) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3) provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *." The ruling below that a trustee in bankruptcy is not a "judgment creditor" within the purview of this section is in full accord with the pertinent decisions

of this Court and of the lower federal courts, and is clearly correct, and there is no occasion for further review.

In *United States* v. *Gilbert Associates,* 345 U.S. 361, this Court ruled (p. 364) that "Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record * * *." See, also, the concurring opinion of Mr. Justice Jackson in *United States* v. *Security Trust and Sav. Bank,* 340 U.S. 47, 52, cited in *Gilbert Associates* at p. 364 ("The history of this tax lien statute indicates that only a judgment creditor in the conventional sense is protected"); cf. *United States* v. *Scovil,* 348 U.S. 218, 221 (landlord not a "purchaser" under Section 3672, since "purchaser" there "means one who acquires title for a valuable consideration in the manner of vendor and vendee"). The holding below is also in accord with the decisions of the three other circuits that have considered this question, and with several district court decisions. *United States* v. *England,* 226 F. 2d 205 (C.A. 9); *Brust* v. *Sturr,* 237 F. 2d 135 (C.A. 2); *In re Taylorcraft Aviation Corp.,* 168 F. 2d 808, 810 (C.A. 6); *In the Matter of Green,* 124 F. Supp. 481 (N. D. Ala.); *In re Ann Arbor Brewing Co.,* 110 F. Supp. 111 (E.D. Mich.); see, also, *United States* v. *Hawkins,* 228 F. 2d 517 (C.A. 9.) There are no conflicting court of appeals decisions.[1]

[1] Prior to *Gilbert Associates*, the Second Circuit, although giving the federal tax lien priority over the trustee's claim on another ground, had ruled that a trustee in bankruptcy was a judgment creditor under Section 3672. *United States* v. *Sands,* 174 F. 2d 384. Subsequent to *Gilbert Associates* and in reliance

The fact that Section 70(c) of the Bankruptcy Act (11 U.S.C. 1952 ed., Sec. 110 (c), *supra*, p. 3) provides that, as of the date of adjudication in bankruptcy, the trustee "shall be deemed" to have all the rights of a judgment creditor, does not make him a "judgment creditor" within the meaning of Section 3672 of the 1939 Code. For the two provisions are designed to achieve different purposes, and the rationale of Section 70(c) that the trustee should be treated as a judgment ~~creditor~~ creditor in order to enable him to marshal the bankrupt's assets for the benefit of creditors, is not applicable to the different problem of federal tax lien priorities that is dealt with in Section 3672. A trustee in bankruptcy, even though treated for some purposes as if he were a judgment creditor, is not such "in the usual, conventional sense of a judgment of a court of record" (*Gilbert Associates, supra*).

2. The court below also correctly held that the United States has a lien for the portion of the tax that was assessed before bankruptcy, even though payment was not demanded until after adjudication. The same conclusion was reached by the Second Circuit in *Brust* v. *Sturr, supra,* at p. 136, and there are no conflicting court of appeals decisions.[2]

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thereon, however, the court reached the contrary conclusion in *Brust* v. *Sturr, supra.*

[2] *United States* v. *Beaver Run Coal Co.*, 99 F. 2d 610 (C.A. 3), upon which petitioners rely (Pet. 15–16), did not involve this question. The issue there was whether the United States was entitled to priority over the claim of a mortgagee where, although the taxes had been assessed prior to the execution of the mortgage, no notice of the tax lien had been filed until subsequent to its execution. The court ruled against the United States, on the ground that it had not complied with the pred-

Section 3671 of the 1939 Code (*supra*, p. 2) expressly provides that, unless another date is specifically fixed by law, the federal tax lien "shall arise at the time the assessment list was received by the collector * * *." The Bankruptcy Act does not specifically fix another date. On the contrary, Section 67(b) thereof (11 U.S.C. 107(b)) provides that statutory liens for taxes and debts owing to the United States, even though arising or perfected while the debtor is insolvent and within four months prior to the date of the filing of the bankruptcy petition, are valid; and that where such liens are required by federal or local law to be perfected, and arise but are not perfected before bankruptcy, they are valid if perfected within the time permitted by such laws. See 9 Mertens, *Law of Federal Income Taxation* (Rev. 1958), Section 54.29; Section 54.40, fn. 44; Plumb, *Federal Tax Collection and Lien Problems* (Second Installment), 13 Tax L. Rev. 459, 488 (1958). While both assessment and demand must be made for the tax lien to be effective, no formal demand is required. Here the United States made a sufficient demand by filing its claim in the bankruptcy proceedings. Cf. *United States* v. *Ettelson*, 159 F. 2d 193 (C.A. 7), holding that the filing of a claim for taxes against an estate in a probate court was sufficient demand. The court below properly held that the formal demand for payment, made after bankruptcy, related back to the time of filing the claim. Cf. *Macatee, Inc.* v. *United States*, 214 F. 2d 717 (C.A. 5).

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ecessor to Section 3672, since it had not filed its tax lien before the mortgage was recorded.

## CONCLUSION

The decision below is in accord with the pertinent decisions of this Court and lower federal courts, it is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*
CHARLES K. RICE,
*Assistant Attorney General.*
A. F. PRESCOTT,
WILLIAM A. FRIEDLANDER,
*Attorneys.*

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## Case Cited


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IN THE

# Supreme Court of the United States

**October Term, 1960**

**No. 269**

In the Matter of

FIDELITY TUBE CORPORATION,

Bankrupt.

BOROUGH OF EAST NEWARK and RAYMOND J. OTIS, as Trustee in Bankruptcy of FIDELITY TUBE CORPORATION, Bankrupt,

*Appellants,*

—v.—

THE UNITED STATES OF AMERICA,

*Appellee.*

## PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC. FOR LEAVE TO FILE A PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Borough of East Newark and Raymond J. Otis, as Trustee in Bankruptcy of Fidelity Tube Corporation, pray for leave to file a petition for rehearing of the petition heretofore filed for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

### Prior Disposition

On October 10, 1960, the Supreme Court of the United States denied the petition heretofore filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Third Circuit. The denial of the petition appears at — U. S. —.

## Grounds for Within Petition

1. It is submitted that a circumstance of substantial effect has intervened subsequent to the denial of the petition for a writ of certiorari; more specifically, a decision rendered by the United States Court of Appeals for the Second Circuit on October 31, 1960, in *City of New York* v. *United States*, No. 26,098, F. 2d , unofficially reported in Commerce Clearing House Bankruptcy Law Reports Bulletin #143, dated November 30, 1960, at Par. 60,042.

2. The case with respect to which certiorari was sought dealt, among other things, with the contention of the United States that it was entitled to lien status for tax claims made against the bankrupt estate despite the fact that, as to one category of claims, assessments had been made prior to bankruptcy, but demand therefor made *after* bankruptcy intervened.

3. Petitioners argued in the brief filed in support of their appeal to the Court of Appeals for the Third Circuit, that no liens could affect the assets and property which came into possession of the Trustee in Bankruptcy *after* bankruptcy, unless said liens were valid and effectual prior thereto.

4. The Court of Appeals for the Third Circuit, in deciding adversely to the claim of petitioners, stated:

> "It is clear that if bankruptcy had not intervened the United States would have had a valid lien if demand was made prior to the date when the assessment became unenforceable by reason of lapse of time and we can find no provision of the Bankruptcy Act which would prevent a lien arising in favor of the United States under Sections 3670 and 3671 because of a delayed demand by the District Director.
>
> "In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the demand is made the lien relates back to the date of the assessment, in the case at bar to a time prior to bankruptcy."

5. In the *City of New York* case, cited above, the Court of Appeals for the Second Circuit has held, contrary to the Court of Appeals for the Third Circuit, that a lien for taxes claimed by the United States must be *perfected* prior to the intervention of bankruptcy proceedings. The Court there was confronted with the lien status of federal tax deficiencies which had been assessed after the taxpayer had made an assignment for the benefit of creditors (which act of assignment constituted an act of bankruptcy).

The Court noted that under the applicable state law governing assignments for the benefit of creditors, the estate was said to be in *custodia legis*, and it further stated as follows:

> "The Section 6321 lien [substantially identical with Section 3670 of the Internal Revenue Code of 1939] attaches only to the extent of taxpayer's property interest, United States v. Burgo, 175 F. 2d 196 (3d Cir. 1949), and is not a proper basis for a levy on contingent rights before they come into being. United States v. Long Island Drug Co., 115 F. 2d 983 (2d Cir. 1940). Thus, the property, after it had been assigned by the taxpayer, could not be subjected to the government's lien."

6. It is submitted that a conflict now exists between the Circuits with respect to the perfectability of a lien asserted by the United States against the estate of a bankrupt and that petitioner should be granted leave to file a petition with this Court for rehearing of the petition heretofore filed for a writ of certiorari.

Dated: December 19, 1960.

Respectfully submitted,

ALLAN L. TUMARKIN,
*Attorney for Petitioners.*

IN THE

# Supreme Court of the United States

**October Term, 1960**

**No. 269**

In the Matter of

FIDELITY TUBE CORPORATION,

Bankrupt.

BOROUGH OF EAST NEWARK and RAYMOND J. OTIS, as Trustee in Bankruptcy of FIDELITY TUBE CORPORATION, Bankrupt,

*Appellants,*

—v.—

THE UNITED STATES OF AMERICA,

*Appellee.*

## PETITION OF BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE, ETC., FOR A REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Borough of East Newark and Raymond J. Otis, as Trustee in Bankruptcy, etc., present this Petition for a rehearing of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, and in support thereof respectfully show:

1. On October 10, 1960, this Court denied the petition heretofore filed by petitioners for a writ of certiorari. The denial of the petition appears at — U. S. —.

2. Petitioners seek a rehearing upon the following grounds:

a) A circumstance of substantial effect has intervened subsequent to the denial of the petition referred to above in that a recent decision of the United States Court of Appeals for the Second Circuit *City of New York v. United States*, No. 26,098, October 31, 1960, F. 2d [ ] now places that Circuit and the Third Circuit in conflict with respect to the perfectability of a lien asserted by the United States against the estate of a bankrupt.

3. The case with respect to which certiorari was sought by petitioners dealt, among other things, with the contention of the United States that it was entitled to lien status for tax claims made against the bankrupt estate despite the fact that, as to one category of claims, assessment had been made prior to bankruptcy, but demand therefor made *after* the filing of the petition in bankruptcy.

4. Petitioners argued, among other things, in the brief filed in support of their appeal to the Court of Appeals for the Third Circuit, that no liens could affect the assets and property which came into possession of the Trustee in Bankruptcy *after* bankruptcy, unless said liens were valid and effectual *prior* thereto.

5. The Court of Appeals for the Third Circuit, in deciding adversely to the claim of petitioners, stated:

> "It is clear that if bankruptcy had not intervened the United States would have had a valid lien if demand was made prior to the date when the assessment became unenforceable by reason of lapse of time and we can find no provision of the Bankruptcy Act which would prevent a lien arising in favor of the United States under Sections 3670 and 3671 because of a delayed demand by the District Director.
>
> "In view of the provisions of Section 3671 an inchoate lien seems to arise at the time of the assessment which is perfected by a demand and when the de-

mand is made the lien relates back to the date of the assessment, in the case at bar, to a time prior to bankruptcy."

6. In *City of New York* v. *United States*, *supra*, the Court of Appeals for the Second Circuit has held, contrary to the Court of Appeals for the Third Circuit, that a lien for taxes claimed by the United States must be perfected prior to bankruptcy proceedings, otherwise it will be treated as an ordinary tax claim. A copy of said opinion is reprinted in full in the appendix to this petition.

For the foregoing reasons, it is urged that this petition be granted and that the judgment of this Court denying the petition heretofore filed for a writ of certiorari be recalled.

Dated: December 19th, 1960.

Respectfully submitted,

ALLAN L. TUMARKIN,
*Attorney for Petitioners.*

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## Certificate of Counsel

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay and that the petition is restricted to the grounds above specified.

ALLAN L. TUMARKIN,
*Attorney for Petitioners.*

# APPENDIX

## Opinion of United States Court of Appeals

(Italics Supplied)

¶ 60,042 City of New York v. United States.

United States Court of Appeals, Second Circuit. No. 28,808. October 31, 1960. Appeal from the United States District Court, Eastern District of New York.

Federal Tax Liens v. State and City Tax Liens—Liens Not Perfected Prior to Bankruptcy Proceedings. Where federal tax liens are not perfected prior to the initiation of the bankruptcy proceedings, the government's claims are treated as ordinary tax claims under the Bankruptcy Act. The government assessed tax deficiencies against a tax payer corporation after an assignment for the benefit of creditors but before an involuntary petition in bankruptcy was filed. See Sec. 64a(4) at ¶ 6028.

Cornelius F. Roche, New York, N. Y. (Charles T. Tenney, Corporation Counsel, on brief), for appellant City of New York. Samuel Stern, Albany, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, on brief), for Industrial Commissioner of the State of New York. Douglas A. Kahn, Washington, D. C. (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, A. F. Prescott, Department of Justice, Washington 25, D. C., on brief), for appellee.

Before Swan, Chief Judge, Clark and Friendly, Circuit Judges.

Opinion in Full Text

Swan, Chief Judge. This case is before us on appeal from an order entered by the District Court for the Eastern District of New York, confirming the order of a referee

bankruptcy granting lien status under 67b of the Bankruptcy Act to certain claims of the United States for tax deficiencies. An involuntary petition in bankruptcy had been filed against the Mohawk Footwear Co. on February 26, 1958, by creditors claiming for unpaid wages and severance pay, and the company was subsequently declared a bankrupt and a trustee appointed.

(Assignment)

Within four months prior to the filing of the petition a general assignment for the benefit of creditors made by the bankrupt fourteen days earlier was perfected by filing the assignment with the New York Supreme Court of Kings County, under New York Debtor and Creditor Law. Subsequent to such assignment, on November 22, 1957, the United States assessed tax deficiencies against the company in the amount of $4,826.64, for Federal Insurance Contributions Act and withholding taxes due for the third quarter of 1957. This claim was in addition to an earlier assessment by the United States made on October 8, 1957, for $2,067.53 plus interest, due for FICA and withholding taxes for the second quarter of 1957. On the very date on which the bankruptcy petition was filed, the federal government made a third assessment in the amount of $277.39 for Federal Unemployment Tax Act obligations, and finally, on December 19, 1958, assessed an additional $84.21 as a further tax deficiency. The United States now seeks to have all but the last of these claims granted lien status under 67b of the Bankruptcy Act, 11 U. S. C. 107(b), which upholds the validity of "statutory liens for taxes and debts owing to the United States . . . created or recognized by the laws of the United States or of any state . . . even though arising or perfected while the debtor is insolvent . . . within four months prior to the filing of the petition initiating a proceeding under this title by or against him."

The United States' claim is opposed by the New York State Industrial Commissioner and the City of New York, each of which have filed tax claims in the bankruptcy proceedings.

The United States' contention that a lien had been perfected prior to the bankruptcy proceedings is based on § 6321 of the Internal Revenue Code of 1954, the relevant portion of which reads as follows:

> "§ 6321. Lien for Taxes.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Under § 6322, the lien arises at the time the assessment is made. As of that moment, therefore, if there exist property or rights to property "belonging" to the debtor, the lien will attach. In determining the nature and extent of the debtor's ownership, however, we are required to look to state law since § 6321 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." United States v. Bess, 357 U. S. 51, 55 (1958); see Aquilino v. United States, 363 U. S. 509 (1960); United States v. Durham Lumber Co., 363 U. S. 522 (1960); Fidelity & Deposit Co. v. New York City Housing Authority, 231 F. 2d 142 (2d Cir. 1956).

## New York Law

Under outstanding New York decisional law, [illegible] for the benefit of creditors takes title to the

debtor's estate and holds as trustee for all the creditors. Brown v. Guthrie, 110 N. Y. 435 (1888); Brennan v. Wilson, 71 N. Y. 502 (1877). The court supervises the trustee and orders distribution of the settled estate to the creditors. N. Y. Debtor and Creditor Law, §§ 8, 15, 20, so that the estate is said to be in custodia legis. In the Matter of Crevelong & Son Corp., 259 App. Div. 351, 353, 19 N. Y. S. 2d 378, aff'd 283 N. Y. 760, 28 N. E. 2d 975 (1940); Florence Trading Corp. v. Rosenberg, 128 F. 2d 557 (2d Cir. 1942). All that the assignor owns after his assignment is completed is the right to have refunded to him whatever remains after the creditors have been satisfied. Mills v. Husson, 140 N. Y. 99 (1893).

*The § 6321 lien attaches only to the extent of the taxpayer's property interest, United States v. Bess, 357 U. S. 51, 57 (1958), and is not a proper basis to levy on contingent rights before they come into being. United States v. Long Island Drug Co., 115 F. 2d 983 (2d Cir. 1940). Thus, the property, after it had been assigned by the taxpayer, could not be subjected to the government's lien.* Nor is the fact that some New York decisions have upheld the validity of a mechanic's lien filed after a general assignment any support for the proposition that the federal government's lien is valid on the facts herein. A case such as John P. Kane Co. v. Kinney, 174 N. Y. 69 (1903), indicates merely that the New York courts have recognized a "preferential statutory right in the nature of an unperfected equitable lien in favor of the laborer, mechanic, materialman, or sub-contractor." Id. at 72. Whatever policy reasons impel the New York courts to impress such a security interest on the debtor's estate even before the creditor satisfies the statutory prerequisites[2] are not binding on this court or anyone

[2] This policy, apparently founded on the desire to ensure that formalities would not defeat the rights of laborers and materialmen whose claims sound in most exculpatory extends even to bankruptcy and validates a mechanic's lien filed after a bankruptcy petition. Gates & Co. v. John L. Stevens Construction Co., 220 N. Y. 48 (1917). Since a tax assessment which validates but imperfect would not give rise to a statutory lien under the Internal Revenue Code, the federal claim is invariably postponed to the [illegible]

when it is not a taxpayer but the federal government which is pressing its claim. In none of the mechanics' lien cases do the New York courts base their decision upholding the lien on an assertion that the assignor retained property rights after his general assignment had been perfected. Since it is only if such rights still belong to him that [6621] impresses a lien on the taxpayer's realty or personalty, the general assignment barred a subsequent tax lien.

The United States, however, contends that 70a(8) of the Bankruptcy Act governs, despite local property law, once a petition in bankruptcy is filed. That subsection, now 11 U. S. C. 110(a)(8), reads, in relevant portion, as follows:

> "The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court."

[Act of Bankruptcy]

The United States maintains that since the present assignment was made within four months of bankruptcy it "constituted an act of bankruptcy within" 3a(4) and

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[6] See Post & McCord v. City of New York, 86 Misc. 340, 148 N. Y. Supp. 508 (1914), aff'd, 166 App. Div. 949, 152 N. Y. Supp. 1148 (1915); Matter of Master Plumbers, Inc., 175 Misc. 956, 25 N. Y. S. 2d 190 (1941).

3b of the Bankruptcy Act, 11 U. S. C., 21a(4), so that upon filing of the petition the title residing in the assignee by virtue of the states' debtor and creditor law was extinguished by the federal bankruptcy statute and he held the property as a "naked bailee" for the bankrupt. Therefore, the federal governmental contentions, the lien attached when the deficiency was assessed against the corporate taxpayer, since the property then "belonged" to the corporation and was held in the custody of its agent.

If we could find a legitimate bankruptcy policy that is furthered by such a construction of § 70a(8), it might not be enough to say merely that the language of the statute gives no retroactive effect to this incursion on local property law; it directs that the property shall "be deemed to be held by the assignee" as an agent. However, there is no reason to suppose that Congress intended retroactively to alter the situs of title to property generally assigned for creditors. The legislative history of the present § 70a(8) indicates that it was meant to be declaratory of existing law and merely to facilitate the summary jurisdiction of the bankruptcy court under § 2a(21) to require assignees to deliver property in their possession to the trustees in bankruptcy. See H. R. Rep. No. 1409, 75th Cong., 1st Sess., 34 (1937); Shor v. McGregor, 108 F. 2d 421 (5th Cir. 1939); 1 Collier, Bankruptcy, para. 2.78; 4 id. para. 70.38. Thus, it makes good sense to have title to the assigned estate revert to the bankrupt at the time when the petition in bankruptcy is filed, though not before, in order to prevent the assignee from maintaining that he is an adverse claimant and thus entitled to plenary proceedings. May v. Henderson, 268 U. S. 111, 115 (1925).

Indeed, a contrary rule would throw into confusion the usual procedures whereby a state protects creditors once a general assignment has been made. Since § 67c of the Bankruptcy Act requires that statutory liens

possessory lien subject to be valid under 67b, the very purpose of a general assignment that of preserving the [illegible] assets and shielding them from levy by the more [illegible] creditors, see Matter of S. Feldman & Co., 247 App. Div. 420, 262 N. Y. Supp. 681 (1933), would be under [illegible] to accept the United States' contention. If the assignee acts retroactively as a mere agent, it [illegible] to remove a private creditor with a statutory [illegible] upon the estate so assigned and then file a petition in bankruptcy. Under the rule the federal government would have us adopt, 67a(5) would uphold a lien [illegible] by such a levy if bankruptcy proceedings are [illegible] within four months of the assignment. Thus, the federal lien is associated with the state's insolvency proceedings would not merely give the federal tax claim a priority which it is entitled to by reason of the Bankruptcy Act, but would also be giving to the extent of his levy, a priority which he is not allowed under state law. Curiously enough, Section 67b of the Bankruptcy Act, which was intended to [illegible] only those rights recognized under state law, [illegible] with the proposed construction of 67a(5) and 67e(2), grant more liberal priorities in bankruptcy to federal claims than would the state under its insolvency proceedings.

The government's further contention that 3466 of the Revised Statutes (31 U. S. C. 191, gives the United States' tax claim a priority would be persuasive had the bankruptcy petition not been filed. However, the Bankruptcy Act did not incorporate the priority provisions of 3466 and they do not apply in bankruptcy. Davis v. Pringle, 268 U. S. 315 (1925).

[illegible] statutes authorizing general assignments for the benefit of creditors have been approved by the Supreme Court [illegible] Section 67a of the Bankruptcy Act [illegible] Section 67a(5) of the Act [illegible] [illegible] [illegible]

[Ruling]

Reversed with instructions to treat $5,104.03 of the claim of the United States entered on April 10, 1958, and all claims filed thereafter, as ordinary tax claims under § 64a(4) of the Bankruptcy Act.